

DE *John Clark*  
JURE MARITIMO  
ET   
N. A V A L I:

OR, OR  
A T R E A T I S E

OF *Edw. Smith*

*Affaires Maritimes,*

And of

COMMERCE

---

In Three Books.

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*The Third Edition much enlarged by Charles Molloy.*

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L O N D O N,

Printed for Thomas Passenger, at the three Bibles on London  
Bridge. 1682.



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JURE MARITIMO  
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NAVALI:

OR  
A TREATISE

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COMMERCE

In three books.

The Third Edition, revised and enlarged by Charles Molloy.

LONDON.

Printed for Thomas Telford, at the Blue-Bottle on London  
1798.

THE Wisdom of God is highly to be admired, who hath not endowed the other living Creatures with that Sovereign Perfection of *Wisdom*, but hath secured and provided for them by natural Muniments from assault and peril and other necessities: But to Man, he formed him naked and frail, because of furnishing him with Wisdom, Understanding, Memory, and Sense to govern his Actions, endowing him with that pious affection of desiring Society, whereby one is inclined to defend, love, cherish, and afford mutual aid to each other: Nor hath he in no less a wonderfull manner (infinitely transcending all humane wisdom and understanding) created the material world to be subservient to his being and Well-being: Yet, without humane Understanding and Reason did he not build a Ship, raise a Fort, make Bread or Cloth: but these came to pass only by humane Arts and Industry, in which by the Revolutions of the Celestial Bodies, Times and Seasons, materials and other necessities are brought forth, by the alteration of which men in their proper seasons, reap the fruits of their Labour; so that there is no Society, † Nation, Country or Kingdom but stands in need of another: hence it is that men knowing each others necessities, are invited to *Traffique* and *Commerce* in the different parts and immensities of this vast World to supply each others necessities, and adorn the conveniencies of humane life.

And as God hath so ordered this wonderfull dependence of his Creatures on each other, so hath he by a Law Immutable provided a Rule for Men in all their actions, obliging each other to the performance of that which is right, not only to Justice, † but likewise to all other Moral Virtues; the which is no more but the dictate of right Reason founded in the Soul of Man, shewing the

*Lactantius lib. 7*

† Seneca 4. de be-  
neficiis cap. 18.

† Leg. ut vim E.  
de iust. & iur. 7.  
& 8.

necessity to be in some act by its convenience and inconvenience in the rational nature in Man, and consequently that it is either forbidden or commanded by the Author of Nature, which is the Eternal Creator of all things; And as God hath imprinted this Universal Law in the minds of all Men, so hath he given Men power (Society being admitted) to establish other Laws which proceed from the will, the which is drawn from the Civil power, that is, from him or them that rule the Commonwealth or Society of Freeman united for their common benefit (which is called the *Laws of Nations*) and which by the will of all or many Nations, hath received force to oblige, and is \* proved by a continued use and testimony of Authentick Memorials of Learned or Skillful Men.

\* *Vasquez* 2.  
*Contr.* 54.4.

*Florentius* 3. p.  
 17. 22. 161. 5.  
*Lex. Servus. D. de*  
*Serv. export.*  
 \* *Cicero offic. lib*  
 1. 1. c. 1. *Panetio.*

Now by the Laws of Nature every Man is bound to profit another in what he can, † nor is the same only lawful but commendable; so true was that saying, *Nothing is more serviceable to man than man.* \* But if Man shall neglect this immutable Law in the aiding and assisting his fellow Citizen, and enquire and dispute why God hath laid this necessity upon him; And when Opportunity gives leave to take the benefit of Wind or Tide (in order to his furnishing himself or Neighbour with those things that adorn humane life) to dispute the Causes of their flux and reflux, and how they vary and change, he not only offends the Laws of Nature, but assumes a power of destroying Society, and consequently becomes (at the least) a wilfull transgressor of the Laws of Nations.

And though the Eternal Power hath so established this necessity in mankind, that every man should stand in need of another man, yet so great a Providence is over industrious men, that scarce any man not disabled by Nature or Accident, Sickness, Impotency, and the like, but by his Industry and pains may earn more than  
 would

would supply his necessities; and so much as any man gets by being truly Industrious above what supplies his necessities, is so much beneficial to himself and family, as also an enriching to that Kingdome or State where he resides. From hence it is, that all Mankind (present or to come) are either Traders by themselves or others; and the ends designed by Trade and Commerce are Strength Wealth and Imployment for all sorts of people, (where the same doth most flourish) the end \*tending to the advancement, Opulency and greatness of such a Kingdome or State.

\*Cok 2. ap. for

*Constantinople* (the Throne once of Christendom) having been Sack'd by *Mahomet* the Second, became a place of desolation as well as horror; yet he by granting a free Trade and Religion soon after repeopled that great (but unhappy) Spot. Nor did *Silemus* tread amiss in following the steps of his Victorious Predecessor, when having the like success on *Tauris* and *Grand Cairo*, he translated the *Persian* and *Egyptian* Artificers and Traders to that repeopled City, following the Example of the *Roman* Virtues. Nor did our Victorious third *Edward* deem it an Act unbecoming his great Wisdom, when he brought in the *Walloons*, whose Industry soon established the Woollen Manufacture; he not desiring to give no less a security for the enjoying their then granted Immunities and Priviledges, than his own Royal Person. Nor did that Politick Princess shut her Ears from embracing the offer of those distressed *Burgundians*, (after the Example of her great and Royal Predecessor who sought refuge in her Dominions from the rigid severity of the long Bearded *Alva*, who planting themselves by her appointment at *Norwich*, *Cotchester*, *Canterbury*, and other Towns, have of those places (then only habitations for Beggars) raised them now in competition with (if not excelling) all, or most of the Cities in *England*, for Riches, Plenty and Trade. Nor

Inno 1453 Vide  
Xenod. History  
of that Monar-  
chy.

Mirror cap 5.  
sec. 2. 11 Ed 3.  
cap. 3.

V Can. de  
Q Eliz. 1. 1.

need!

need we run into the History of earlier Times to give an account of the many Kingdom and States that have risen by Industry and Commerce; 'tis enough if we cast our eyes on our Neighbour the *Hollander*, a place by relation of *Ortelius* not much bigger than *Turkshyre*, and such a Spot, as if God had reserved it as place onely to dig Turf out of, for the accomodating those Countreies wherein he hoards up the miseries of Winter, it affording Naturally not any one Commodity of use, yet by Commerce and Trade (the Daughters of Industry) it is now become the Store-house of all those Merchandizes that may be collected from the rising to the setting, of the Sun, and gives those People a name as Large and High as the greatest Monarch this day on Earth: Nor need we pass our of Christendom to find Examples of the like, when *Venice*, *Genua*, *Lubeck*, *Embsden*, and the rest of the Hanziatique Towns (once the Marts of the World, till Sloth, Luxury and Ambition got within their Walls, and drove it to Ports of Industry) that have since kist and embrac'd it, the which this Isle by the Influence of His Royal Majesty hath been no small happier in.

Hence it is that Trade and Commerce are now become the onely object and care of all Princes and Potentates, its Dominion not being acquired by the ruful face of War, whose footsteps leave behind them the deep impression of misery, devastation and poverry, they knowing the return of Commerce is Riches and Plenty of all things conducing to the benefit of humane life, and fortifying their Countreys with Reputation and Strength.

It was Trade that gave occasion to the bringing of those mighty Fleets to Sea, as if God had left it to them to decide by force (where in no Age or Time can witness the like) the Empire of the World. Hence it was (the advantages being found which arise by Commerce) that

Anno { 1656.  
1672.  
1673.



that *Navigation* got its birth into the World, reducing the several Nations on the Earth by that means to be even as one common Family; and when in this Isle we were even in the state of Canibals, it brought in a People that instructed us in Arts, Policies and manners, and taught us actions, no less virtuous than those themselves followed. And though long and difficult it was before that mighty People could be brought over to have thoughts of the advantages arising from *Commerce* and *Navigation* (they onely propounding to themselves Blood, Slaughter, Conquest, the Riches, and Spoils of Nations:) but when they entred into the *Carthaginian* War, a quarrel with a People not worth the opposition of a Tribune, (as they thought;) but finding that neither *Tribune* nor *Pretors*, no nor the Flower of the *Roman* Army was able to withstand them, or to prevent the Invasion of their Countrey, and then in the very bowels of the same, put it to the Question, *Rome* or *Carthage* Mistress of the World, they began to consider whence and from what causes those unknown *Africans* should withstand the *Conscript Fathers* and power of *Rome*, and should dare to dispute with those that had led so many Captivated Kings in Triumph, and brought so many Haughty Nations to Truckle under their Victorious Eagles: at last they found it was *commerce* and *Navigation* that gave power and force to that Mighty People; Then it was that *Rome* began to know that *Rome* could not be *Rome* without a *Naval* force; the which, and to redeem their bleeding Honour they soon hastened and equipt, great as their Competitors: and afterwards *Argentum* being won, *Carthage* became no more impregnable; after which with Peace they plowed the Neighbouring Streights to *Tinges*, *Gades*, and the *Herculean Streights*; nor could any thing be too difficult afterwards, till they arrived on the *British* shore, where beholding her ample Bayes, Harbours, Rivers, Shores and

*Cambden.*

*Quæstus omnis indecorus patribus, sayt. Livy lib. 1. Dec. 3.*

Though they had 100 Rostrated Ships, and 75 Gallies, under *Calais Daulus* and Colleague, as *Polybius* observes.

\*\*

Stations,

Stations, (the Jewels and Ornaments of that Spot, and having made a Conquest of the same) they soon cultivated into our rude Natures the Spirit of Commerce, teaching & instructing us in those polite ways that fortifie a Kingdom by Naval force, as *Standard and undeniable marks of Empire*, & by ayding and teaching us in the driving on a continued and peaceable Trade of *Commerce*, we have fathomed the unknown depth of the *Indian Shears*, uniting as it were extreame, made the Poles to kifs each other, teaching us thereby, that it was not the vast Immensties of Earth that Created Empire, but Situation accompanied with *Industry, Commerce and Navigation*, that would enable a People to give Laws to the World: In the pursuit of whose Virtues this Nation hath not been wanting, and of following their great Directions in the enlarging our Fleets, for they, when they advanced their Eagles on the *British Shore*, found us not then without Ships of Force, time having not been so envious to this Island, as to eat out those Records where in mention is made † that the *Britains* accompanied the *Cymbrians* and *Gauls* in their Memorable Expedition to *Greece*, long before the Incarnation of the Worlds Saviour; and it was from that Center that the Mighty *Cesar* first drew his Line, and took thoughts of plowing the Ocean to find out that Warlike People to face his victorious Legions, whom having Landed, and finding a place adorned by Nature beyond any thing that could be called great, taught us to maintain that superiority of Dominion that no Neighbouring Nation should frequent our peaceable Shores, & those Merchants that came, assigned them Places to drive their Commerce and Traffique, jealous that any Neighbouring Rival should kiss beloved *Britannia* but a *Roman*, and for whom he fetcht so long and tedious a march: Thus in our Infancy teaching us both Defence and Commerce. And when that mighty Empire began

† *Camden Strabo*  
*lib. 5.*

*Gauls Town*  
near *Tarmouth*  
the Mart for  
those Neighbouring  
Merchants.

to moulder and mix among the Natives, and to become  
 as one People again; then Sloth, Luxury and Idleness,  
 (the fore-runners of ruine) invaded our Shores by a fa-  
 tal stupidity. It suffered our floating Castles (Bulwarks  
 of the Kingdom) to rot in their pickled Brine; and our  
 Ports to be surveyed by foreign people; which supine  
 negligence soon subjected us a prey to our ambitious  
 Neighbors, who no sooner finished their Conquest, and  
 sheath'd their devouring Swords; but each (as if inspi-  
 red by the very *Genius* of the place) equipped our Fleets  
 great as their Commander, to secure what they had so  
 dearly won, of whom *Story* makes mention of the migh-  
 ty *Arthur*, no less famous in his warlike Atchievements,  
 then in leading his Squadrons as far as *Ireland*, bringing  
 those *Northern* People to pay obeysance to his vic-  
 torious Standard, and acknowledge him as their Supream  
 Lord even from the *British* to the *Russian* Tracts; and  
 by him left to the famous *Edgar*; \* who no sooner found  
 his undoubted Right; but resolved to vindicate that Do-  
 minion which his Royal Predecessor had with so much  
 glory acquired, and with so great care had communica-  
 ted and remitted down to his Successors: No less a num-  
 ber then four hundred Sayl of Ships did that mighty  
 Prince at once cover the Neighbouring Ocean, making  
 them the *Portcullis* of this Isle and the adjacent Seas, by  
 which he vindicated his Dominions on the Waters, and  
 gave Laws in the Chambers of his Empire: Nor did his  
 Successors *Cunutus*, (whom Record makes mention, that  
 having laid that ancient Tribute called *Danegelde*, for  
 the guarding of the Seas and Sovereignty of them, was  
 emblematically express sitting on the shore in his Roy-  
 al Chair while the Sea was flowing, speaking, *Te-  
 nera vitris es, & terra in tua manu est*.) *Egbert*, *Al-  
 fred*, *Ethelred* forget the assertion of their great Pre-  
 decessors Dominion and Sovereignty of the same under  
 no lower a Style then Supream Lords or Sovereigns of

*Abrahamus*  
*Whitlockus de*  
*prijis Angli rum*  
*Igitur*, written  
 originally by Mr.  
*Lambard*

\* Inferred in  
*Lopes Edwards*,  
 and afterwards  
 confirmed by  
 the *Norman*  
*Conqueror*.

Mr. *Selden's*  
*Mare clausum*.  
 l. 2 c. the 10th to  
 he 16.

*Mathew Westm.*  
*Anno 1035. fol.*  
*409. Selden Ma-*  
*re Clausum. lib. 2*  
*cap. 11.*

the Ocean, surrounding the British Isles: never so much as  
 contested by any Nation whatsoever, unless by those  
 that attempted the Conquest of the entire Empire, in  
 which that became subject to Fate as well as the other  
 of the Land: Nor did the succeeding Princes also of the  
*Norman Race* start or wave that mighty advantage in  
 their successive Claims, and maintaining their Right to  
 the adjacent Sea; as appeared not long after by that  
 Famous Accord made between *Edward the First* and  
 the *French King Philip the Fair*, calling \* him to an  
 account for Pyracies committed within the *British*  
*Seas*; the Submission of the *Flemings* in open Parlia-  
 ment in the Second *Edwards* Reign; and the Honour or  
 Duty of the Flag, which the Politick King *John* had  
 above Four hundred years since challenged by that Me-  
 morable Ordinance at *Hastings* † there decreed to take  
 place universally, not barely as a *criminy* but as a *Right*  
 to be paid *cum debita reverentia*, and persons refu-  
 sing to be assaulted and taken as Enemies, the same  
 not onely to be paid to whole Fleets bearing the Roy-  
 al Standard, but to those Ships of Priviledge that went  
 the Princes Ensigns or Colours of Service. Nor was  
 this barely a Decree written, but nobly asserted by  
 a Fleet of no less than 500 Sayl in a Voyage Royal  
 of his, wherein he sail'd for *Iceland*, in his way  
 commanding all Vessels which he met in the Eight cir-  
 cumfluent Seas to pay that Duty & Acknowledgment.  
 Nor was the Third *Edward* slow in following the  
 steps of his wise Predecessors, when he equipp'd out  
 a Fleet of no less then 733, (though on another occa-  
 sion) with 230 of which he vanquished a Fleet of twice  
 the number before *Calais*, to the loss of 30000  
*French*. Nor did our Vctorious Conquerour of the Se-  
 pulchre, the Great *Richard the Second*, in his re-  
 turn from the *Holy Land* want a Navy Royal to attend  
 him home, by the force of which he took and destroyed

\* *Coke 4. Inst. fe.*  
 14.

† *Inter Leges*  
*Marinas sub fine*  
*anno Regni Regis*  
*Johannis, 2.*

near

near 100 more Ships of the *French*. And look we but into the mighty Actions of the succeeding Princes, we shall find all that that designed Empire but Zealous in the encouragement of Navigation, looking on that Axiom as undeniable, \* *Qui mare tenet, eum necesse esset necum potari*, and that without which, the British Sovereignty is but an empty Title.

\* Cic. ad Allic. l. 10 Ep. 7.

Not ought alone the Praises of those great Monarchs, whose mighty care had always been to preserve the reputation of their Empire in their Maritime preparations; to be remembred; but also those of our Inhabitants, who always have been as Industrious to follow the encouragement of those Princes under whom they flourish'd, and who with no less Glory and timely application in Traffique, did constantly follow the examples of those of *Genoa*, *Portugal*, *Spaniards*, *Italians* and *Venetians*, whose Fame in matters of Commerce ought to be inrolled in letters of Gold, since the Ages to come, as well as present, having been doubly obliged to their memory, the third of which making use of a discontented Native of this Isle, the Famous *Columbus*, who prompted by that *Genius* that naturally follows a Native wise man, discovered a New World, in whose Expedition he fathomed unknown Paths, and detected the *Antillus*, *Cuba*, and *Jamaca*, &c. and the *Terra Firma* of the *American* Shore, who taking his Conjectures from the spiring of certain Winds from the *Western* Points, by strong impulse accompanied with that Philosophy he attained to, concluded some Continent must needs be hid in those unknown Parts; his Service being first offered to his Prince and refused, he was soon after entertained, purely on the faith of that Noble Princess *Isabella* of *Spain*, who for 17000 Crowns (for which she engaged her Jewels) she received not long after as many Tuns of Treasure, and to her Husband's own use, in Eight or Nine years time, as

Born in England, but resident at Genoa.

*Campanella Hist. Hispan.*



came to above Fifteen hundred thousand of Silver, and Three hundred and Sixty Tuns of Gold: Thus Ingenuity encouraged, though in one single Person, hath occasioned Wonders, and from a small Kingdom (as *Spain*) it hath since raised its head in a condition of bringing all those many Kingdoms and vast Emperiums of Earth which they possess under their protection, putting them once on thoughts of no less than an Universal Conquest. We need only mention *Sebastian Cabott*, a Native of *Brissol*, who discovered *Florida*: and the Shores of *Virginia*, dedicated to that Virgin Princess *Elizabeth*; *Thorn*, *Eliot*, *Owen*, *Gwyned*, *Hawkins*, *Cavendish*, *Forbisher*, *Davis*, *Stallson*, *Raleigh*, and the Incomparable *Drake*, who was the first (agreed Universally) of any Mortal to whom God vouchsafed the stupendious Atchievement of Incompassing not this New World alone, but New and Old together, twice embraced by this Mighty Man, who first making up to *Nombre de Dios*, got sight (with Tears of Joy) of the *Southern Seas*, the which in five years after he accomplished it, passing through the *Magellan Streights* towards the other *Indies*, and doubling the famous *Pacifimontory*, he circumnavigated the whole Earth. Nor ought that truly worthy Captain Sir *John* *Norborough* be precluded from having place after the mighty *Drake*, he having not long since passed and repassed the *Magellan Streights*, by which that Worthy Person hath performed that Atchievement which was never yet done by any mortal before. To reckon up the particular Actions of *John Oxenham* (a sharer in that mighty performance of *Drake*) of his drawing his Vessel up to Land, and covering the same with boughs, passed the unknown paths of Land from *Nombre de Dios* to the *South Sea*, and there building a Pinace entered the Isle of *Perles*, and from the *Spaniards* takes a Treasure almost beyond credit; of the indefatigable dili-

diligence of *Willoughby, Burroughs, Chancellor, Button, Buffin, Norbisher, James Middleton, Gilbert Cumberland*, who ploughed up the *East and North-West Cathaian* and *China* passage; of *Jones and Smith*, whose Fortune and Courage was great in those Parts; of *Poole*, who found out the Whale Fishing; of Captain *Bonnet* the first discoverer of *Cherry Island*; *Gillian* and of *Pett*, and *Jackman* that passed the *Vaigues*, *Scythian* Ices, and the River of *Ob*, as far as *Nova Zembla*; nor of the Famous *Davies*, who had penetrated to 86 degrees of latitude; and almost set his foot on the *Northern Pole*; Men whose Actions in the atchieving of discoveries, and pointing out to Places for an immense improvement in Navigation and Commerce, ought to be intolled in the Temple of Fame as Monuments to succeeding Ages, of their mighty and Laborious Travels and Industry. The consideration of all which gave some sparks of encouragement to the writing the ensuing Tract, especially when reflecting that among all Nations there is a Common Law which governs the mighty thing of Navigation and Commerce, I had some impulses more than ordinary to induce me to the same; especially at a time when Navigation and Commerce were never (from the erection by Divine instinct that mighty Prototype the Ark, to this present Age,) in greater esteem then now, and by which we have found vast and great easements and discharges from those Royal and Just Rights and Dues which ever were, and of Old justly due to those that Govern'd this Empire; therefore ought by all ways and means to be fortified and encouraged; be it by whatsoever Art, Science or thing that does in the least point out towards the same. Nor was it then wanting in thoughts to promote and incite the Professors of the Law, raising and stirring up their Genius to the advancement of the Law in this point: and though I believe many have wish'd that such a thing

Tempore Eliz.  
Reginæ Angl.

might be, yet none that I can find have ever yet attempted the same: nor is it possible, unless those things which are by Law *constituted and known*, be rightly separated from those that are *natural*; for, natural Law is immutable and always the same, therefore may easily be collected into Art. But things that come from Constitution, because they often vary and change, and are diverse in divers places, are put without art, as other precepts of Laws positive or municipal. Hence it was that the Constitutions and Laws of *Rhodes* for their Justice and Equity got footing amongst other the bordering People on the Mediterranean, *Rhodium usque rerum disciplina Navalis & gloria remansit*; yet when they as well as the *Romans* became subject to fate, they then remained only as examples of Justice and Reason for

*Manil. pro Orat.  
Lege.*

And Mr. Serjeant *Calk* must be so understood of the ancient Civil and Modern Roman Law reduced into one, and they are now two Laws, one Civil, and the other Imperial, but only one, that is, the Imperial. Vide his reading on the Statute of Sewers, sect. 1. fo. 3 b.

The Articles of Inquirz annexed to them in 12 Ed. 3.  
The Inquisition at *Quinbot*  
*rough*. 49. E. 3. Annr 1375.  
Statutes of Inquirz transla-  
ted by *Roughston*.

others to imitate and follow: An obsequious Adorer of which was the great *Justinian*, who caused them to be inserted into the Civil Law; & though they obtained a place amongst others of the Ancient *Romans* as well as the Modern, yet have they not all received by custom a force as may make them Laws, but remain only as they bind the Authority in shew of reason, which have not always alike, but varies according to Circumstance of time, place, state, age, and what other conveniences or inconveniences meet with it. Nor have those Laws instituted at *Oleron* obtained any other or greater force than those of *Rhodes* or Imperial, considered only from the reason the which are not become Laws by any particular custom or constitution, but only esteemed and valued by the reasons found in them and applied to the case emergent.

'Tis true that in *Rome* and some other parts of *Italy* and *Germany*, and the Kingdom of *Portugal*, in all those cases wherein the municipal Ordinances of those Countries

Countries have failed in providing the Imperial Laws,  
(if the case be such as that it *non Tragua peccado*, or be  
not spiritual) is there made of force; but there is no other  
Nation, State, or Republick can be named where any  
part of the body of those Imperial Laws hath obtained  
the just force of a Law, otherwise then as Custom hath  
particularly induced it; and where no such settled Cus-  
tom hath made it a Law, there it hath force only accord-  
ing to the strength of reason and circumstance joyned  
with it, or as it shews the opinion and Judgement of  
them that made it, but not at all as if it had any com-  
manding power of obedience, that is, *valet pro ratione  
non pro inducto jure; pro ratione, quantum Reges, Dyna-  
sta & Respublice intra potestatis suae fines valere pa-  
tiantur*. And for Spain it is observed, *Hispani Duplex  
habent jus, solum Canonicum scilicet & Regium, Civile*  
(meaning the Imperial Laws) *non habet vim Legis sed  
rationis*. And since this Kingdom as well as most others  
being free from all subjection to the Empire, having con-  
stituted or known Laws of their own, exclude all Impe-  
rial power and Law, otherwise then as Custome hath va-  
riously made some admission; I applyed my self to the  
collection of such matters, according to my inconsider-  
able Judgment, as are either constituted by the Supream  
Authority of the three Estates, or that which hath in  
some measure obtained by continued custome the force  
of Law in reference to matters Maritime and of Com-  
merce, as well in cases publick as private.

Solidit. of Ho-  
nour, Lib. c. ult.

By the first part of which I thought it necessary, since  
Nature by Traffick hath made us all Kinsmen, to consi-  
der and examine upon what Grounds and in what man-  
ner Commerce was first procured and established, which  
is by the Laws of Leagues, Embassies and the like, which  
is a thing fit to be known; so likewise of what may inter-  
rupt the same, and likewise of those perpetual Rights that  
are between those that have any reference to Sea-faring  
causes in matters Civil.

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In

In the prosecution of this Work I have taken care to refer those things which pertain to the *Laws of Nature* unto Notions so certain, that no man without offering of violence to himself may deny them; and to ascertain the truth of such, I have used the testimonies of such Authority (as in my weak Judgement of Credit to evince the same) and as to that Law which we call the Law of Will or Common consent, or the Law of Nations, for that which cannot by sure consequence be deduced out of sure principals, and yet appears every where observed, must needs have its rise from free will and consent, which is that which is called the *Law of Nations*; both which (as much as possible) hath been endeavoured to be kept asunder where the matter hath required it. And for the Civil Law, I have ascertained several Authorities which I have made use of, that is of the *Romans*, into three sorts, the *Pandects*, the *Codex of Theodosius* and *Justinian*, the *Novel constitutions*, and these most excellent *Jurisconsults* that have by their profoundness of Judgement illustrated the obscure paths of the same Law; the third those most excellent persons who joyned Policy to Law, as *Grotius*, *Raleigh*, *Selden*, and the like. Of other Pieces that of *Shardius*, entitled *Leges Navales Rhodiorum*, & *selectæ Rhodiorum*, *Pearus Pekins* the *Zealand*, *Lotinus*, *Vinius*, that of *Oleron* collected by *Garasius* alias *Ferrand*, and *Clericack*. *Common Law*, I have as carefully as possible referred to their several Authorities. In the whole Work I have nowhere meddled with the *Admiralty* or its Jurisdiction, knowing well that it would have been impertinent and lawcy in me to enter into the debate of *Imperium merum*, *Imperium mixtum*, *Jurisdiction simplex*, and the like, and of the bounding out of Jurisdictions, which in effect tends to question the Government, and trip up the Power that gives Laws and Protection to us, since all that can be

It is called *Imperium*, because it proceeds from the authority of the Judge, and not from any right inherent in the party.

Leg. 1. §. de Const. Princip.

Coke lib. 10. fol. 79. in la

Casa del Marechal.



be said, as well on the one side as the other, hath been so fully and learnedly handled and treated of by several worthy persons, (that have indeed said all that can be said) but more especially in that Famous Dispute not long since before His Sacred Majesty in Council, where all the most Elaborate and Ingenious Reasons that could be drawn by the Skill of a Learned Civilian, were there asserted in vindicating the Admiralties Jurisdiction by the Judge of the same, Sir *Lionel Jenkins*, in answer of whom was produced that Great Good Man the Lord Chief Justice *Hale*, who as well by Law positive as other his great Reasons, soon put a period to that Question, and layd that asleep which during his days, it may modestly be presumed, will hardly (if ever) be awakened.

He that hath never so little to do with the Compass, though he sits still in the place, does as much or more then all the other necessary noise in the Ship; the comparison is quit of Arrogance, for it holdeth in the design, it is not meant of the performance.

And though I well know, that those that spend their time in brewing of Books are by *Seneca* compared to petty Painters, that busie themselves in Copying out Originals, having this half Verse of *Horace* often thrown in their Teeth;

*O imitatores, Servum pecus!*

Yet I have this hope left, That my faults and flaws, like those found in the Cuts of Diamonds, may at this time the easilier escape under the excellency of their Subject, or at least under that of your Charity.

\*\*\* 2 The

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**N**O sooner had the Eternal Power Created Man, but  
He bestowed on him a Right over the things of this in-  
feriour Nature; nor was his Goodness lessened upon  
the Reparation of the World, after the Flood, ( *As Justin l. 43.*  
*things being then undivided and common to all, as if all*  
*had one Patrimony* ) since every Man might then take to his use what  
he pleased, and make consumption of what he thought good in his  
own eyes; which use of the Universal Right was then instead of Pro-  
perty, for what any one had so taken, another could not without  
injury take away from him.

II. Nor was it impossible for that State to have continued, if  
Men through *great simplicity*, or *mutual charity* had lived together,  
and this is instant in those *Americans*, who through many Ages  
have lived in that community and custome, and the other the *Cha-  
rity*, which the *Essens* of old practised, and then the *Christians*,  
who were first at *Hierusalem*, and at this day not a few that lead an  
affectick life; the simplicity of our first Parents was demonstrated by  
their nakedness, there being in them rather an *ignorance of Vice*,

A Theatre is  
common, yet  
the place pos-  
sessed by any  
one, may be  
rightly called  
his own.

*Iustin. lib. 2. Ut de Scythis loquitur Troguus.* than a knowledge of *Virtus*, their only business being the Worship of God, living easily on those things which the Earth of her own accord brought forth without labour.

*Primum inter Homines mali nescia, & adhuc astutia in experta simplicitas.*

*Seneca Naturalium 3 in fine.*

*Ne insignare quidem aut parare limites camp. fas erat.*

*Grotius de Mar. Libero cap. 15.*

*† Cic. Offic. 2. Addendum illud Quintilianus; Si hac conditio est, ut quicquid in usum hominis cessit,*

III. Yet in this simple and innocent way of life, all Men persisted not, but some apply'd their minds to various *Arts*; the most ancient of which was *Agriculture and Pasture*, appearing in the first *Brothers*, not without some distribution of *Estates*, and then from the diversity of each Man's actions, arose *Emulation*, and then *slaughter*; and at length, when the Good were infected with the Bad, a *Gigantick kind of life*, that is *violent*; but the World being wasted by the *Flood*, instead of that fierce life, succeeded the desire of *Pleasure*, whereunto *Wine* was subservient; and thence arose *unlawful Loves*, but by that more generous vice *Ambition*, Concord was chiefly broken, after which Men parted asunder, and severally possess'd several parts of the Earth; yet afterwards, there remain'd amongst Neighbours a Communion not of Cattle, but of Pastures, because in the small number of Men, so great was the latitude of Land, that without any incommmodity it might suffice to the uses of many, untill the number of Men, so of Cattle increased, Lands every where began to be divided, not among Nations as before, but among Families; an instance of which we have hourly before our eyes in those vast immensities that are daily appropriating and a planting in *America*. From hence we learn what was the cause for which Men departed from the Primitive communion of things, first of *movables*, and then of *immovables* also; to wit, because when not content to feed upon that which of it self, and the Earth singly brought forth, to dwell in *Caves*, to go *naked*, or clad with *rinds of trees, or skins of Beasts*, they had chosen a more exquisite kind of life, there was need of Industry, and using of Art in those matters, which they should give themselves up to. So likewise from hence we learn, that Men not content to live in that innocent state of Community, how things went into Property, not only by the act of the mind (for they could not know the thoughts of one another, what every one would have to be his own; that they might abstain from it, and many might desire the same thing) but by a certain *Covenant*, either *express* as by division, or *tacit* as by *occupation*; for so soon as Communion did not please them, and division was not made, it ought to be supposed an agreement amongst all, that every one should have proper to himself what he seized on, † for every one might prefer himself before another, in getting those things useful for the accommodating of *Humane Life*, Nature not being repugnant to the same.

IV. And though Property may seem to have swallow'd up all that Right which rose from the common state of things; yet that is not so; for in the *Law of Dominion*, *extremam necessitatem* seems excepted. Hence it is, that in Navigation, if at any time Victuals fail, what every one hath, ought to be brought forth for the common use; and so in a Fire, I may pull down or blow up my Neighbours House, to save mine; destroy the Suburbs, to raise Lines or Forts, to preserve the City thereby; dig in any Mans Grounds for Salt-Peter, cut in pieces the Tackling or Nets upon which my Ship is driven, if it cannot be dis-intangled by other means, all which are not introduced neither by the *Civil Law*, nor the *Municipale Laws* of Countreys, but are expounded by them, with their proper diversities.

13 Ed. 3. *ut. distress.* 170. 11 H. 7. 5. Reniger & Fogastus, Plowden, c. 1. *ra the* 10. Coke 3. *Inst.* fol. 83.

V. Nor is Property so far instated in Man, but the same may again be divested by such means as stand with the *Law of Nature* and Nations; and first by War, the causes of which are assigned to be three, *Defence, Recovery and Revenge*. by the *Laws* of Nations one may take Armes to abate the growing power of his Neighbours. *Sed ut vim pati possit ad vim inferendam jus tribuat, ab omni aequitatis ratione abhorret*: But that a possibility of suffering force, should give a right of offering of force, this is far from all equity, says the excellent *Grotius*, lib. 2. cap. 1. *sect.* 27. Sir *Walter Raleigh* in Hist. of the World, cap. of Duels, fol. 550.

But then such War must be just, and he that undertakes it must be a *Sovereign*; the just causes to make a War are our *Princes*, or *Countreys* defence, and that of our *Allies*, the satisfaction of our injuries, or theirs; our just pretentions to an Estate or Right; Divines have added another, not only the defence of Religion, but its advancement and propagation, by the way of Arms, and some the extirpation and rooting up a contrary. Certainly War is too rough a hand, too bad a means, to plant Piety; *Sicut non Martyrem poena, sic ferrem pugna, sed causa*; As it is not the punishment that makes the Martyr, so it is not fighting that declares a valiant Man, but fighting in a just Cause; in which who so shall resolutely end his Life valiantly, in respect of the Cause, that is, in the defence of his Prince, Religion or Country, ought to be numbred amongst the *Martyrs of God*.

VI. War by the *Laws of England*, is accounted when the *Courts of Justice* are shut up, and the Judges and Ministers of the same cannot by Law protect Men from violence, nor distribute Justice. So when by *Invasion, Insurrection, Rebellions*, or such like, the

*proprum si habens, profecto quicquid jura possideatur, injuria auferitur.* *Macrobius Saturn. lib. 3. c. 12.* *Leg. 2. § cum in eadem D. ad Leg. Rhodani. Quonon fragm. § Quod ait. D. incend. Leg. Quamadmum § Item. D. ad l. Aquilam.*

*Rald. lib. 3. de rerum diversorum,* seems to have been of opinion, that



14 E. 3. tit. Sci-  
re facius 123.  
inter Mortimer  
and Th. Earl. of  
Lancaster.

current of Justice is stoppt and shut up; *Et silent Leges inter arma*; then it is said to be time of War, and the Tryal of this is by Records and Judges of the Courts of Justice, and not by a Jury: the Kings *Standard* appearing in the Field, or at Sea, does likewise denote a War; and if the Rebels against whom the Kings Host marches, breaks a Prison, the Goaler is not lyable, for they are not such Rebels as are capable of being suppressd by the ordinary Ministers of Justice; but the subject matter is now only touching Forraign War, or that which is commenced for Dominion or Right, or for the maintaining of the same in our peaceable possession, according to Justice.

VII. By the Law of *Nature* in such a War, those things are acquired to us, which are either equal to that, which being due unto us, we cannot otherwise obtain, or else is such a mark as does infer damage to the guilty part, by a fit measure of punishment. And by the *Laws of Nations* not only he that wagaeth War on a Just Cause, but every one in Solemn War, and without end and measure is master of all he taketh from the Enemy in that sense, that by all Nations, both *himself* and *they* that have Title *from him*, are to be maintained in the possession of such things; which as to external effect we may call Dominion: Cyrus in Xenophon, *It is an everlasting Law among Men, that the Enemies City being taken, their Goods and Money should be the Conquerours*; for the Law in that matter is as a common agreement, whereby the things taken in War become the Takers: from the Enemy are judged to be taken away, those things also which are taken away from the Subjects of the Enemy; and Goods so taken cannot by the *Law of Nations* be properly said taken, but when the same are out of all probable hopes of recovery, that is, as Pompanius observes, brought within the bounds or guards of the Enemy; for, says he, such is a Person taken in War, whom the Enemies have taken out of our, and brought within their guards, for till then he remains a Citizen: And as the Law of Nations is the same reason of a Man, so likewise of a thing; and therefore Goods and Merchandize are properly said to be the Captors, when they are carried *infra Præsidia* of that Prince or State, by whose Subject the same were taken, or into the Fleet, or into a Haven, or some other place where the Navy of the Enemy rides: for then it is that the recovery seems to be past all hope.

Hujusmodi res  
non tam capta  
quam recepta in-  
telligitur, per D.  
per Pomponius  
& L. Leg. in Bel-  
lo Parag. Si quis  
servum in pr. de  
Capt. & post.

2 R. 3. f. 2. Tres-  
pals Stratham Pl.  
54.

And with these Laws agrees the *Common Law* of this Realm, which calls such a taking a *Legalis Captio in Jure Belli*, and therefore in 7. R. 2. an Action of Trespals was brought for a Ship, and certain Merchandize taken away, the Defendant pleaded that he did take them in le haut Merre ou les Normans queunt sont

Enc-

**Enemies le Key** : and it was adjudged, that the same Plea was good.

In the year 1610, a Merchant had a Ship and Merchandize taken by a *Spaniard*, being an Enemy; a month after a Merchant Man, with a Ship called *The Little Richard*, retakes her from the *Spaniard*: it was adjudged, that such a possession of the Enemy, divested the Owner of his interest, and the retaking afterwards in *Battel*, gained the Captors a property.

'Tis true, the Civilians do hold, that it is not every possession that qualifies such a Caption, and makes it become the Captors; but a firm possession (that is) when the prize doth *pernoctate* with the Enemy, or remain in his possession, by the space of 24 hours; but as this is a new \* Law, so it is conceiv'd to be against the ancient as well as the modern practice of the Common Law: for the Party in the ancient Presidents doth not mention by their Plea, that the prize did *pernoctate* with the Enemy, and but general, that the same was gain'd by battle of the Enemy.

But, if such a Recaption is by one of the King of *Englands* Ships of War, their Restitution has been made, the Party relieved paying his offering to the Admiral, commonly called *Salvage Money*.

VIII. This right of changing of Dominion or Property, by force of Arms, is so odious, that in the taking of Goods, if by any possibility, the right owners may have restitution, the same hath been done: And although a larger time than twenty four hours happens, between the capture and recapture, and so may *pernoctate* with the Captor, yet restitution may be made, and therefore if one Enemy takes the Ship and Merchandize of another Enemy, and brings her into the Ports or Havens of a *Neuter Nation*, the Owners may seize her, and the *Admiral* of that *Neuter Nation*, may in some cases restore the Ship and Goods to their Owners, and the Persons Captive to their former liberty: the reason is, for that the same ought to have been brought *infra Præsidia* \* of that Prince or State, by whose Subject she was taken.

A *Dunkirk*er having seiz'd a *Frenchmans* Vessel, *super altum Mare*, sold the same with her lading at *Weymouth*; whither it had been driven before she was brought *infra Præsid. Dom. Reg. Hispania*: the *Frenchman* coming into Port, then claims the benefit of the Laws of Nations, the King of *England* being then in Amity with both their Princes, and that Restitution be made; in which Case it was resolved by all the Judges, \* That if there be a Caption by Letters of *Marque*, or by *Piracy*, and the Vessel and Goods are not

M. 8 Fac. in B.  
R. Brownlow 2.  
part. in West-  
ne. C.  
NEW EDINBURGH

\* *Consulat Mar-  
ris* c. 28. 287.  
*Consist. Gallia*  
l. tit. 13. art. 24.  
7 R. 2. Tres. pais  
Stattham Pl. 54.

\* *Res quæ intra  
præsidia perdu-  
ctæ nondum sunt,  
quæquam ab  
hostibus occupa-  
tæ, Dominium  
non mutant ex  
Genium Jure.  
Grotius de Jure  
Belli ac Pacis, l. 3.  
c. 9.*

\* *Trin. 17. Car.*  
in B. R. Mar-  
tho's Reports.

brought *infra Prædia* of that Prince or State, by whose Subject the same was taken, the same will not divest the Property out of the Owner; with this agrees the Law Civil, and restitution may be made.

mediately vested in the Captor, upon the taking; but a conditional Property to answer the original debt, or damage, which cannot be done without a Judicial adjudication, the opportunity of which he hath lost by bringing the prize into the Countrey of another Prince: for as to private War, their Countries are as an Asylum, *per Leg. Libertas, & de Leg. Iur.*

IX. But if the Ships of War of Nations in Enmity meet at Sea, and there be a Caption, if there be that which is called a *firm possession*, the *Neutral Nation* cannot re-deliver or make restitution of the thing so acquired: and so it was adjudged, where *Samuel Pellaggy* with a Ship of War of the *Emperour of Morocco*, took a *Spanish Ship*, and brought the same into *England*, that he could no ways be question'd for the same *criminaliter*, or restitution to be made *civiliter*; for that the King of *Spain* and the *Morocco Emperour* were Enemies, and the King of *England* in Amity with both, and that such a caption is not called *Spoliatio*, sed *Legalis captio*, in which there can be no restitution made up on neither of the Stat. of 31 *H. 6. cap. 4.* or 27 *Ed. 3. cap. 13.* for he that will sue to have Restitution in *England* for Goods taken at Sea, must prove that the Sovereign of the Party was in Amity with the King of *England*. Secondly, that he that took the Goods, his Prince was at the time of the taking in Amity with the Sovereign of him whose Goods were taken; for if he, which took them, was in Enmity with the Sovereign of him whose Goods were taken, then the same will not amount unto a depredation or robbery, but a lawful taking, as every Enemy might take of another.

A *Spanish Merchant*, before the King and his Council, in *Camera Scaccarii*, brought a Bill against divers *English Men*, wherein setting forth, *quod depradatus & spoliatus fuit*, upon the Sea, *juxta partes Britannia per quendam Virum Bellicosum de Britannia, de quadam Navi*, and of divers Merchandises therein, which were brought into *England*, and came into the hands of divers *English men*, naming them, and so pray'd Process against them, who came in, and pleaded, that in regard this depredation was done by a Stranger, and not by the Subjects of the King of *England*, they ought not to answer: It was there resolv'd, *Quod quisquis extraneus*, who brings his Bill upon this Statute to have Restitution, *debet probare quod tempore captionis fuit de amicitia Domini Regis*, and also, *quod ipse qui eum receperis, & spoliavit, fuit etiam sub obedientia Regis, vel de amicitia Domini Regis, sive Principis qua-*

ten-

*Bulstrode 3. part. f. 28. cited in Marsh's Case.*

The getting of Letters of Repri-  
val against a Nation, does not make a War between both States; nor can they be said to be at enmity.  
22 E. 3. f. 23.

2 R. 3. f. 2.

7 E. 4. 14. 13 E.  
4. 9. 12 E. 3. f.  
23. 2 R. 3. f. 2.

27 E. 3. c. 13  
31 H. 6. c. 4.  
which gives  
Restitution by  
the Chancel-  
lour, and one  
Judge, and by  
the Chancel-  
lour alone.

*remis, quia si fueris inimicus, & sic ceperit bona, tunc non fuit spoliatio, nec depredatio, sed legalis captio, prout quilibet inimicus capis super unum & alterum.*

But, if the King of England is in Enmity with the States of Holland, and one of their Ships of War takes a Merchant-Man of the King of England, and afterwards another Ship of War of England meets the Dutch-Man and his prize, and in aperto praelio, regains the prize, there restitution is commonly made, the Owners paying their *Salvage*: so where the prize is recover'd by a Friend in amity, or comes into his Ports, restitution is likewise made; but when such Goods become a lawful and just prize to the Captor, then should the Admiral have a tenth part, following the religious example of Abraham, after his Victory over the five Kings.

X. He that is an Enemy, may every where be assaulted, according to the Laws of Nations; Enemies may therefore be attack'd or slain on our own ground, on our Enemies, or on the Sea; but to assault, kill, or spoil him in a Haven or Peaceable Port, is not lawful; but that proceeds not from their Persons, but from his Right that hath Empire there, for Civil Societies have provided that no force be used in their Countries against Men, but that of Law, and where that is open, the right of hurting ceaseth: the Carthaginian Fleet was at Ancor in Sybax Port, who at that time was at peace with the Romans and Carthaginians; Scipio unawares fell into the same Haven, the Carthaginian Fleet being the stronger, might easily have destroy'd the Romans; but yet they durst not fight them: the like did the Venetian, who hindred the Greeks from assaulting the Turkish Fleet, who rid at Anchor in a Haven, then under the Government of that Republique; so when the Venetian and Turkish Fleet met at Tunis, though that very Port acknowledges the Ottoman Emperour, yet in regard they are in the nature of a Free Port to themselves, and those that come there, they would provide for the Peace of the same, and interdicted any hostile attempt to be there made.

But they of Hamborough were not so kind to the English, when the Dutch Fleet fell into their Road, where rid at the same time some English Merchant's Man; whom they assaulted, took, burnt and spoil'd, for which action, and not preserving the Peace of their Port, they were by the Law of Nations adjudg'd to answer the damage; and I think have pay'd most, or all of it since. But Enemies in their own Ports, may be assaulted, burnt or destroy'd, by the Law of Arms.

XI. If the Ships of any Nation happen to arrive in any of the King

*Huiusmodi res non tam capta, quam recepta intelligitur: per D. Leg. Pompeianus. & per Leg. in Bello Par. si quis servum in pr. de Cap. & post.*

*Per Leg. postliminium, Par. Postliminio, de Capt. & postlim. Boyce, and Cole, and Claxton, Hill. 26, & 27 Car. 2. in B. R.*

Restitution made formerly by a French-Man, who had regained an English prize out of the hands of a Dutch-Man of War.

*Anno 1665, 1666. Bell. Angl. cum Batav.*

*This is Ius Belli, & in Republica maxime conservanda sunt*

*Jura Belli. Reg.*  
129. *Arrest.*  
*fact. super bonis*  
*Mercator. Alienig.*

Some of old have held that *Clavicus. Agricola*  
& *Mercator belli utroque colat commutetur. pace fruuntur.*  
Co. 2. Inst. f. 58.

*Consul. Maris.*  
c. 273.

*Hostis sit ille, & qui intra praesidia ejus sunt:*  
Let him be our Enemy, and they that are within his Guards.

*Liv. l. 37, & alibi passim.*

*Gregor. lib. 9. Romani nos ho-*

*nestissimas eas atque justissimas credimus possessiones quas Belli Legem captas habemus; nosque vero induci possumus ut frustra facilitate deleamus virtutis monumenta, si eas illis reddamus, quibus semel perierunt: imò vero tales possessiones, non tantum cum his qui nunc vivunt civibus nostris communicandas; sed & posteris relinquendas censemus: Tantum adest ut partem relinquendo in nos ipsas ea constituamus, quae in Hostes constitui solent. Titus Lartius his opinion in the Senate of Restitution: We Romans believe those possessions to be most honourable and just, which we have taken by the Law of War; nor can we be induc'd by a foolish facility to part with the Monuments of our Valour, and restore them to those that were not able to keep them; nor do we judge such possessions to be communicated only to our Country-men now living, but to be left to our Posterity: so far are we from relinquishing what we have got, and dealing with our selves, as if we were our own Enemies. De Vef. idem in Romulo narrat Plutarchus.*

King of England Ports, and afterwards and before their departure, a War breaks out, they may be secured, priviledged without harm of Body or Goods; but under this limitation, till it be known to the King, how that Prince or Republique of those, whose Subjects the Parties are, have used and treated those of our Nation in their Ports. But if any should be so bold, as to visit our Ports after a War is begun, they are to be dealt with as Enemies.

XII. By the Laws of Nations, generally all things are the Captors, which he takes from his Enemy, or which his Enemies gain'd from another by force of Arms; so likewise all those Goods, that he shall find in his Enemies custody: But then it must be apparently manifest, and evidently prov'd, that it is really the Enemies; for if an English man should have Goods in the custody of a Dutch Factor at Cales, and a War should break out between that Prince and that Republique, yet are not the Goods of the English man subject to the seizure of the Spaniard, it being apparent, the Owner is not a Subject of their Enemies: So likewise if the Goods of Friends are found in the Ships of Enemies, this does not *ipso facto*, subject the same to be prize by the Laws of Nations; thought it be a violent presumption, and may justly bear a legal examination, till which there may be a securing of the prize, till adjudication shall pass. So on the other hand, if the Ships of Friends shall be freighted out to carry the Goods of Enemies, this may subject them to be prize, especially if the Goods shall be laden aboard by the consent or privy of the Master or Skipper; though in France they have subjected and involved the innocent with the nocent, and making both of them prize: In the late Flemish Wars with England, the Offenders became obsequious servicable with their Ships to the Traffick and Commerce of both Nations: memorable was the action, when the War was between the two

Republicques, *Veneci* and *Genoa*, the Grecian Ships being then employ'd, (as those of *Ostend*) were search'd, and the Enemies pull'd out,



but no other matter done; however, it is most certain, let the *Commission* of *Protection* of such Ships be what they will, if Men will venture to trade under such a cloak, it behoves them, that the *Skipper* and his *Crew* be entirely ignorant; for it is his *Action* that will go far in the freeing, or making absolute the prize, and Goods so made prize, the property is immediately gone and changed by the Owner be who he will, he never can claim the same; for the Laws of Nations make the *Enemies* first masters by *external Dominion*, and then by *Conquest*, give the property to the *Captor*: following that Judgement of the *Romans*, what so ever they got of their *Enemies* by *Valour*, they would transmit to their *Posterity* by *Right*.

XIII. 'Tis not against Nature, to spoil the Goods of him, whom it is lawful to kill; and by the Laws of Nations, it is permitted that the Goods of the *Enemies* may be as well spoiled as taken; and *Polybius* observes; that all things of the *Enemies* may be spoiled, their Ships, Goods, Ports, &c.

XIV. And though it may happen sometimes, that a War may break out, and there may be no publick denouncing or proclaiming the same; that if a *Friend*, or *Neuter* should assist an *Enemy* with *Contraband Goods*, that is *Armes*, &c. whether upon such a caption, the Goods may be made prize, the resolution of which will depend on these Considerations.

First, by Natural Law, where either force offered, is repelled, or punishment exacted, of one that hath offended, there needs no denunciation; for Princes are not to stand debating with words or arguments, being injured beyond words: For War is undertaken to resist violence, is proclaim'd not by an *Herald*, but by *Nature*; for it is no more than the invading of one for another, or taking of the Goods of the debtor; to answer the Creditor damage.

Secondly, *Interpellation* is introduced by the Laws of Nations, whereby Princes or Republicques, having received injuries, may apparently shew that they had no other way to recover their own, or that which is due to them: for such *Interpellation* following after injuries committed, constitutes that Prince or State in a fault that shall not render satisfaction.

Thirdly, admitting that *Interpellation* hath gone, and satisfaction hath been required for the damage, and no satisfactory return hath been made, whether then the Ships or Territories of the *Enemy* may be assaulted: and for that is has been conceiv'd they may; for denunciation is no more but to signify that the Parties, against whom the same is commenc'd, are unjust, and will not do right, and therefore War is begun by the Supreme Powers: now Princes or

Hist. 5.

3. *Eliz. in C. B. Owens Reports*, fo. 45. but q. of that Case.

Grotius lib. 3. cap. 3.

Republicques, having done that which by the Law of Nature they were not oblig'd to do, that is after a wrong done, abstain'd from War by friendly demanding of satisfaction or reparation; (which is requir'd only by the Laws of Nations) and publique Justice being deny'd them; there remains no other or further obligation on the State, the same amounting, and indeed is an apparent *defiance*; and *Proclamation* is no other.

So that if *Indultion* is not necessary, the caption of such Ships may subject them to be prize, (perhaps the *League* of the several Countries; may have provided for cases of the like nature.)

XV. And although the Goods of Friends, according to the circumstance of the Case, may be preferr'd by adjudication, and restor'd to their owner; yet all manner of Goods have not that privilege; for though the *Freedom of Trade* preserves the Goods of Friends against the rigour of War, yet it does not those Goods that supply the Enemy for War, as *Money*, *Vissuals*, *Ships*, *Armes* and other things belonging thereto, for to supply an Enemy that invades our right, or seeks the destruction of our Countries, is a liberality not to be allow'd of, and it certainly stands with necessity, that if I cannot safely defend my self, or endanger my Enemy without intercepting the things sent, it may justly be done: but when such Goods are seized; whether they give the Captor a Right of Property, or a Right by Retention, to compel that neuter Nation to give Caution for the future, by *Hossages* or *Pledges*, not to supply the Enemy, may be a question. The *Romans*, who had brought Vissuals to the Enemies of *Carthage*, were taken by the *Carthaginians*, and again render'd upon request; the *Hollanders* in the heat of the War between *Sweden* and *Poland*, never suffer'd themselves to be interdicted with either Nation; the same State when they had War with *Spain*, they intercepted the *French* Ships, passing to or for *Spain*, but restor'd them.

And *Pompey*, in the History of the *Macedonian* War, set a Guard on the *Bosphorus*, to observe if any Merchant failed in thither; who soever did, and was taken, was surely put to death; so *Demetrius* when he possessed *Asia* with his Army, having blockt up *Athens*, hang'd up both the Master and Commander of a Ship, who attempted to bring in Corn: the *Hollanders* having blockt up *Dunkirk*, some *English* Merchants Ships did attempt to coast, but were deny'd by the *Hollanders*.

Most certain, if a Neuter Nation hath had notice of the War, and caution given them (as is usual) not to supply the Enemy with Counterband Goods, as they call them; if such be the case, the prize

Vide Treaty  
1. December at  
London, 1674.  
Art. the third,  
what is meant  
by Goods Con-  
traband, or Pro-  
hibited. Mer-  
chandize.

Cambden. vi-  
de anno 1589,  
1595.

Plutarch.

Murinus in his  
Danish Hist. 1.  
part. 2.

prize is become absolute the Captains: So Queen Elizabeth did, when she seized on the *Sancti Spiritus* *Town*, who were carrying of Goods; *contra Contrabanda*, to the Spaniards her Enemy; she condemned them, and made them absolute prizes, *for as much as are not compellable by the rigour of War, to give anything against their will, so must they not against the will of each Party afford such things, as may damage the Enemy*; for Persons or Nations having had notice of the War, which is done, and caution given sometimes by Proclamation, or some other publick Edict, signifying the right of their Cause; shall afterwards gather to, and assist the Enemy, whether Associates, Neuters, or Subjects, the same yields a right, so far as to them; not only to the charge and damage that may fall thereby, by making them prize; but may make them obnoxious to punishment; *For it is the duty of those that abstain from War as do nothing for the strengthening of him, who maintains a bad Cause, whereby the motions of him that wages a just War may be retarded*; and where the cause is doubtful, they ought to strew themselves equal to both, permitting Passage, Baking, Dressing, and affording Provision for each Army, or Navy.

going to them, Fire Balls, Powder, Matches, Bullets, Pikes, Swords, Lances, Spears, Holberts, Guns, Mortar pieces, Perards, Granadoes, Musket-rests, Bandoliers, Salt peter, Muskets, Musket-shot, Helmets, Corbels, Breast plates, Coats of Mail, and the like kind of Armature; so for Horses, and other Warlike Instruments: (*Nil Marini Treaty between England and Holland. 1. Decemb. 1674. Art. 3.*)

*L. Amilius Prator*, accused the *Tejans* for Victualling the Enemy's Navy, promising them Wine, adding, that unless they would do the like for the Navy of the *Romans*, he would account them as Enemies: but common experience hath taught Nations and Kingdoms, when they declare a Neutrality, to make provision by way of League with both the Nations at War, that when it should happen the Armies of both, or any draw towards their Territories, it might be lawful for them to exhibit the *Common offices of humanity* to both.

The *Venetians* having so far prevail'd against the *Turk*, in the Island of *Candia*, that they held the City of *Candia*, straightly besieged by Sea and Land, whereby they had reduc'd it to great extremities; it happened at that time to ride about seven stout Merchant Men, in the Port at *Smirna*; the General of the *Christians* being jealous of their joyning with the *Turkish* Armado, desired to know their minds, who answer'd, they would prove Neuter in the dispute; but afterwards (though at first the Captains all refused) upon the threatening of the *Grand-Seignior*, to lay an Embargo on all the Goods of the *English* Nation in his Dominion, and to make

*vide Tit. Gallo-*

*met. 3. 1111*

3. Eliz. C. B.

*Omnes 45.*

*vide the Procla-*

*mation of Hol-*

*land to England.*

*&c.*

*Bald. ad l. 2. c.*

*de Serv. n. 70.*

Under the name

of Contraband

may be compre-

hended Arms

only, as pieces

of Ordinances,

with all Imple-

ments belong-

ing to them, Fire

Balls, Powder,

Matches, Bullets,

Pikes, Swords,

Lances, Spears,

Holberts, Guns,

Mortar pieces,

Perards, Granadoes,

Musket-rests,

Bandoliers, Salt

peter, Muskets,

Musket-shot,

Helmets, Corbels,

Breast plates,

Coats of Mail,

and the like kind

of Armature; so

for Horses, and

other Warlike

Instruments: (*Nil*

*Marini Treaty*

*between England*

*and Holland. 1. Decemb.*

*1674. Art. 3.*)

So likewise it is

Ships, Masts and

whatsoever shall

be thought or

ascertain'd capa-

ble of Arming

an Enemy.

*Barcol. L. nullus*

*mar. l. 2. de*

*Judaic Calico-*

*luc.*

*Ann. 1650. or*

*1651. vide R.*

Cocks of the Church's State in equal danger with the Trade.

slaves of their Persons; those Captains were forced to joyn with the Turkish Forces, who beat the Christians from before *Casoa*, and so reliev'd it; the *Venetians* Embassadors complain'd to the other Powers in *England*, but could have no relief, being answer'd, that those Ships in the Turks power, were Subjects to it.

## CHAP. II.

### OF Letters of Marque, and Reprisal.

- I. Of Reprisals generally considered.
- II. That Reprisals are allowed only by the Laws of Nature, and the Romans.
- III. That the same by the Laws of Nations, are now become lawful.
- IV. The advantage that accrues by the same.
- V. The Causes that require the same.
- VI. Of the things necessarily requisite for the obtaining them.
- VII. Reprisals ordinary and extraordinary, according to the Laws of England.
- VIII. Of the Interest of Princes of granting them, and Letters of Request.
- IX. The difference of injuries offer'd to Subjects and Forraigners; when and where the one is concluded, and not the other.
- X. What is meant by denying of Rights, and doing of injustice, and where Reprisals take rooting, and where not.
- XI. Of Reprisals awarded in cases ordinary.
- XII. Of Reprisals issuing forth in cases extraordinary.
- XIII. Of Letters of Request precedents, allotting a time certain for satisfaction.
- XIV. Domestic and origination subjects to reprisals.
- XV. Reprisals not granted if the spoil was occasioned by War.
- XVI. Of Persons exempt from Reprisal by the Laws of Nations, Canon and Civil Law.
- XVII. Where Ships or Goods are subject to Reprisals, and where not.
- XVIII. When Rights deny'd, whether Life is engag'd, and whether Persons refusing to yield may be slain.
- XIX. Goods taken by Reprisals, where the Property is altered, and where otherwise.
- XX. Where many Ships are present, and one becomes Captor, whether the spoil must be divided or remain to that became Master.
- XXI. Of the Captors duties after a Prize taken, and its exemption from Customs.
- XXII. Restitution, when to be made, after the debt satisfy'd.
- XXIII. Contribution, whether it can be by the Laws of England to him whose Goods are taken by Reprisals.
- XXIV. Commissions awarded for the enquiring of depredations, under which the Parties may probably obtain recompence.

**R** Eprisals known to us by the word of *Represalie*, or *Letters of Marque*, in Law have other appellations, as *Pignorat*, *Clarigatio* and *Androlepsia*, &c. In imitation of that *Androlepsia* among the *Greeks*, to seize the three next Citizens of that Place, whither the murderer had fled, and was always given to him who required revenge of the offender; the word *Reprisals* is from the *French* *reprendre* and *reprise*, i. e. *resumptio*, that is to re-take or take again one thing for another, like our *Saxon* *at iudernan*.

Reprisals are all one, both in the

Though

Though the Art is now become lawful by the Law (indeed the *consent* of Nations; yet it must have its Standard mark, for the same cannot be done by any private Authority; but only by the Power of that Prince or Republick, whose Subject the injur'd person is; nor is the same grantable by Authority, but where the Party injur'd has *Justice deny'd* him, or the same *illegally delay'd*.

II. By the *Law of Nature*, no Man is bound for anothers Act, but only the successour of his Estate, for that Goods and Estate should pass with their *Burdens*; was introduc'd together with the *Dominion* of things; hence it is, that the Son cannot be molested for the debt of his Father, † neither the Wife for the debt of the Husband, nor the Husband for the debt of the Wife; the same being against natural equity, that one should be troubled for the debt of another.

So it is, that no particular Men ow not, or are oblig'd for the debt which the *Community* owes; that is, if the *Community* have any Goods; but if Money be lent to a *Community*, each particular is naturally bound, as they are a part of the whole, if the *Stok publicke* be wanting: If one lends my Country Money (says *Seneca*) *I will not call myself his debtor, yet will I pay my share*: And again, *Being one of the People, I will not pay as for myself, but contribute as for my Country*: Naturally, nay, by the very *Roman Law*,\* one Village was not bound for the other, nor one Mans Possessions charged for another; no not so much as with the debts publicke: the reason being added, *that it was against reason for one to be charged with the debt of another*.

III. And though by the *Law of Nature*, one Mans Goods are not ty'd for the debts of another, no not for those of the *publicke*; yet by the voluntary *Law of Nations*, the same might be introduced and brought in; and the same may stand well with the *Law of Nature*; for that might be introduced by custome and tacit consent, when even sureties without any cause, may subject and make lyable their Goods and Estates for the debts of a Stranger. So likewise, that for any debt, which any *Civil Society*, or the *Head* thereof ought to make good; or because the *Sovereign* or a *Head* hath not done right in anothers debt; but hath made himself lyable to render satisfaction; such a *Society* may oblige and make lyable all their Goods corporeal or incorporeal, for the reddition of satisfaction. Hence it was, as the Great *Justinian* observes, that this custome was Constituted by the *Nations*, grounded on the urgency of humane needs, assisted with the greatest of necessities, since without this great licence would be given and tolerated, for the committing of depredations and injuries; especially if only the

Common and Civil Law: *Reprisalia est potestas pignorandi contra quemlibet de terra detentoris data creditore pro injuria & damni acceptis. vocabular. utriusque Juris.*  
27 E. 3. Stat.  
2. cap. 17.

† *Leg. unica. c. ut null. ex vi. legis. c. ne uxore pro. mar. & non sit pro patre socius.*  
*Ulpian. Leg. ficut fuit. quod cuique universum.*

*Et, singuli debemus non tanquam proprium, sed tanquam publicam publici partem. Seneca lib. 6. de benefic.*  
c. 20. & cap. 19.

\* *Leg. nullam. c. de Execut. & Exactionibus.*

*In Nov. Inst. 52. 134. C. unica de injuriis in sexio.*

*Inst. Inst. de Iuri Nat.*



## Of Letters of Marque and Reprizal.

Goods of Rulers were made lyable, who seldom possess any thing that for satisfaction the injured may easily come by, whereas those private Men, whose Commerce is various, may be caught for recompence, sometimes with the greatest of ease, and freed from danger. Besides, the Owners of such prize, being members of the same Society, might more easily obtain mutual Right, for satisfaction of the injur'd, and their own future indemnity than Forraigners could, who without such a tie, would be very little regarded.

*Baldus 3. cons.  
58. Barrol. de  
Repress. q. 5. ad  
ter. num. 9.*

*ghed. to whom  
it was not law-  
ful to make War  
against the Ara-  
bians, might  
lawfully use vi-  
olence. Job. lib. 6. Livy  
lib. 34.*

IV. The benefit which this Custom of Obligation hath now introduced, is become Universal, and common to all Nations; so that People that are at one time griev'd with this burden, at another time might be eased of the same, and by such taking, the oppressed might the more easily obtain Justice, and War be prevented. The Carthaginians would not suffer Arifon the Tyrian to be taken; for said they, *the same will befall the Carthaginians at Tyre, and in other Towns of Trade, whereto they resort.*

V. A due administration of Justice, is not the least sense, wherein Princes are styled Gods: To deny or delay Justice, is injustice; Justice is every Mans Right, who hath not forfeited what he might claim by the *Jus Gentium*.

If therefore the Party cannot obtain his Definitive Sentence or Judgement, within a fix time against the Person of whom he complains, or if there be a Judgement given against *apparent Right* and Law; yet if no relief can be had, the Bodies or movables of his Subject, who renders not Right, may be taken.

*C. de sententia  
et de sent. ex-  
com. in 6. Consue-  
Leg. qui restitu-  
re de rei vindic.*

VI. In the prosecution of which there must be,

1. The Oath of the Party injur'd, or other sufficient proof, touching the pretended injury, and of the certain loss and damage thereby sustain'd.
2. A proof of the due prosecution for the obtaining a satisfaction in a legal way.
3. Protestation or denial of Justice.
4. A Complaint to his own Prince or State.
5. Requisition of Justice by him or them, made to the Supreme Head or State, where Justice in the ordinary course was deny'd.
6. Persistency still, in the denial of Justice.

All which being done, Letters of Reprizal under such cautions, restrictions, and limitations, as are consonant to Law, and as the special case may require, may issue not only by the *Jus Gentium*, and

*+ Mag. Charle-  
C. 10. the later  
Clause.  
Clause. 7. Johan-  
ni Reg. m. 22.*

by the Ancient and Municipal Laws of this Kingdom. if  
VII. The Reprizals grantable by the Laws of England, are of two sorts; Ordinary and Extraordinary. The Ordinary are, where any

any *English* Merchants or their Goods are spoiled, or taken from them, in parts beyond the Sea by Merchants Strangers, and cannot upon Suit to the King demanding of Justice for him, obtain the same, he shall have upon testimony of such prosecution, a Writ out of the *Chancery*, to arrest the Merchants Strangers of that Nation their Goods here in *England*; the which is grantable the Subject opposite of *Common Right*, by the *Chancellor* or *Keeper of England*, who always in such case hath the approbation of the King or Council, or both, for his so doing.

The *Extraordinary* are by Letters of *Marque*, for Reparation at Sea, or any place out of the Realm, grantable by the *Secretaries of State* with the like approbation of the King or Council, or both.

VIII. And as Princes by the *Laws of Nations*, are responsible for injuries publick, so should they by the most prudent wayes imaginable, prevent those that are private, not suffering Forraigners, if possible, to receive wrongs in their Countries: For, as the *Florentine* observes, *If a Man be exceedingly offended, either by the publick, or by any other private hand, in a Forraign Nation, and cannot obtain reparation according to Justice, he will never leave blowing the coals; or cease promoting the injury, till the flame break out in War in which he dares not if he sees the ruine of that Kingdom or State, where he receiv'd his wrong.*

Nor should the Prince or State of the Person injur'd, value his misfortune at so low a rate; as to deny him Letters of Request; for that were to heap up injury upon injury; but likewise if Justice be deny'd after such Request, to Arm him with Power to take satisfaction by Reprize, *vi, manu & militari.*

Generally there are ways proceed Letters of Request, two or three, more or less; and according to the satisfaction, sufficient or insufficient, returned in answer to the same, Commissions are awarded.

IX. Subjects resist by force hinder the Execution, even of an unjust Judgment; nor lawfully pursue their Right by force, by reason of the efficacy of the Power over them: But Forraigners have a Right to compel, which yet they cannot use lawfully, so long as they may obtain satisfaction by Judgment. But if that ceases, then Reprisal is let in.

Now Judgment is obtained either in the ordinary course, by way of Prosecution, or Suit, or Appeal from the same, after Sentence, or Judgment given to a higher Court; or else in the *Extraordinary* way, which is by way of Supplication, or Petition to the *Supream Power*: but we must understand that to be, when the matter in controversy is, *sani quod merita quam quod modum procedendi*; not doubt-

Pat. 15 E. 3.  
Part. 2. cap. 18.  
Par. 23. H. 6.  
part. 1. dorf. 14.  
15.  
Fitz. H. N. Bre.  
f. 114. Reg. 129.  
Par. Rolls 14. 14.  
H. 8. par. 1. dorf.  
15. 17. 11. 6.  
10. 5. 6. 7. par. 1.  
dorf. 18. 11. E. 4.  
par. 2. m. 15.  
dorf. 1. 2. 4.

Macdonell on his Tit. Liv. C.A. Prince in this later Age lost his Country; but for a load of Sheep-Skins.

Leg. qui resistere. de rep. vindicat.

22. Jul. 2.

Res judic. pro veritate habetur; nec ita est true. Index malis judicant pro injuria tenentur. Et cum per in-

juriam Judicis  
domino rem qua  
auctori non fu-  
isset; abstulisset  
creditor; quasi  
obligatum sibi;  
& quæritur, an  
solutus debitor re-  
siliat nam opor-  
teret; debitori  
Socvola resti-  
tuendam proci-  
vit, Leg. scriptu-  
ram II. de distr.  
pign.

\* *Vernus debitor  
tunc a solutus  
fit natura tamen  
debitor permanet.* Paulus Leg.  
Infin. D. de  
cond. indebitor

Nath Vendomus,  
nath n-ga imus,  
aut differemus  
Iustitiam, Grand  
Charter. Coke  
2. Inst. 56.

Case of slaugh-  
ter, *Lee* against  
the Governour  
of *Leighorn* up-  
on the Petition  
of *Gould* and  
*Canham* Mer.

doubtful, for in doubtful matters the presumption is ever for the Judge, or Court.

But the Reprial must be grounded on a wrong Judgement, given in matters *not doubtful*, which might have been redressed one way or other; either by the ordinary or extraordinary Power of the Country or Place; and the which was apparently *perverted*, or *deny'd*.

But if the matter be doubtful, then otherwise; for in cases dubious or difficult, there is a presumption always that Justice was truly administered by them, who were duly elected to publick Judgements.

XI. And yet in this latter Cafe, some\* who are of opinion, that if the Cause were dubious, and if the Judgement were against apparent right, the Stranger oppressed is let into his satisfaction; and the reason is, because the Judge's Authority is not the same over *Forrainers*, as over *Subjects*: for the reason above-mentioned.

If an *English Merchant* shall prosecute a Suit in the Ordinary Courts of Law beyond Seas, and Sentence or Judgement shall pass against him, from which he appeals to the *Supream Judgement*, and there the first Judgement or Sentence is affirmed, though the Complainant hath received a Judgement against the *real rights* of the Cause, yet this will be no cause for Letters of Reprizal, though perhaps it may occasion Letters of *Requissit* (if there be strong circumstances for the same) to have a rehearing of the cause.

But if an *English* Man shall recover a debt there, and then the Officer, having the debtor in custody, will wilfully let the Prisoner escape, and then become insolvent; the same may perhaps occasion Reprizal.

In *England*; if a Forraigner brings an Action personal against *A. S.* and the matter is found *Special*, or *General*, and the Party prays Judgment, and the Court refuses it; and then the Defendant dies, and with him the Action, (the nature of it being such) the Party is here without remedy, the same may occasion Letters of Reprizals, if it be accompanied with those circumstances, that evince an apparent denial of Justice, *&c.* as putting it off from *Term to Term*, without cause.

An *English* Man pursues his Right in the Legal Courts beyond Seas; and the Military Governour opposes the prosecution, and by force conveys away the debtor and his Goods, the Sentence or Judgement is obtained, its ultimate end being *Execution*, being thus frustrated, may occasion Letters of Reprial.

XII. Persons murdered, spoiled, or otherwise damaged in hostile manner, in the Territories or places belonging to that King, to whom Letters of Request are issued forth, if no satisfaction be returned

ned, Letters of Reprizal may issue forth; and the Parties petitioners are not in such cases compelled to resort to the Ordinary prosecution: But the Prince of that Country, against whom the same are awarded, must repair the damage out of his or their Estates, who committed the injuries; and if that proves deficient, it must then fall as a common debt on his Country.

XIII. Such Letters of Request generally allot a time \* certain for damages, to be repaired, if not Reprizals to issue forth.

other depredations committed by the *Flemings*, on the *English*, his Majesty in 1615. issued forth his Letters of Request to the States of *Holland*, for satisfaction within 18 Months; otherwise Letters of Reprizal. *Vide Journals of that year, and Leo Aitzema, p. 48. 13. 41. 82.*

XIV. It is not the place of any Mans *Nativity*, but his *Domicil*; not of his *Origination*, but of his *Habitation*, that subjects him to Reprize: The Law doth not consider so much where he was Born, as where he lives, not so much where he came into the World, as where he improves the World.

If therefore Letters of Reprizal should be awarded against the Subjects of the *Duke of Florence*, and a Native of *Florence*, but Denied or Naturalized in *England*, should have a Ship on a Voyage for *Leighorn*, if a caption should be made, the same is not lawful, nor can the same be made prize.

XV. Nor doth it any where appear, that *Reprizals* can be granted on misfortunes happening to Persons or their Goods, residing or being in Forraign parts in time of War there; for if any misfortune happens, or is occasioned to their Effects, or to their Persons, then they must be contented to sit down under the loss; it being their own faults, they would not fly or relinquish the place, when they foresaw the Countrey was subject to the spoil of the Souldiers, and devastation of the Conquerour.

The Faction of the *Guelphs* and *Gibellins* in *Florence*, warring against each other, the *Guelphs* obtaining the Victory, and thrusting the *Gibellins* out of it, after they had taken the City, *Domus consilii Hugonis de Papi in hoc Regno Anglia demorantis diruerunt*, and plundered his Goods therein, *qui Hugo supplicavit Dom. Regi, ut inde Itali Mercatores* of that Faction and City then in *England* *emendari hic sibi facerent*; upon which adjudicatum fuit; *quod dicti Mercatores, dicto Hugoni satisfaciunt pro damnis susceptis, & destructioni domus sue*: Upon which a Writ of Error was brought, and the Judgment was reserved, in these words; *Quod non est consuetudo Anglia de aliqua transgressione facta in aliena Regione, tempore Guerra, vel alio modo, consideratum est, quod totum processum & ejus effectum provocentur, &c.*

chants in Nov. 1670. on which two Letters of Request are given to the Great Duke of *Tuscany*, for redress.

\* After the massacre at *Amboyna*, and the

1615. issued forth

otherwise

82.

*Rex facit in  
Regium Nun-  
tium Populi Ro-  
mani Quirit.*

*vafa comiteſque mos.* The Embaſſadors of the Romans being ill uſed by the Carthaginians, and Scipio's Army having ſurprized the Embaſſadors of the Carthaginians, was demanded what ſhould be done to them, answered, not as the Carthaginians have done to the Romans.

XVI. By Right (for ſo it is now called of rendring like for like) there are many Perſons exempted, and thoſe whoſe Perſons are ſo privileged, have alſo protection for their Goods, ſome by the Laws

of Nations, ſome by the Civil Law, others by the Common Law; among which *Embaffadors* by the Laws of Nations, their Retinue and Goods are exempt, coming from him, who awarded the Reprize, the Laws of Nations not only providing for the Dignity of him that ſends, but likewiſe the ſecurity going and coming of him that is ſent.

Nor againſt thoſe that travel for Religion; nor on Students, Scholars, or their Books; nor on Women or Children; by the Civil Law: nor thoſe that travel through a Country, ſtaying but a little while there.

By the *Canon Law*, Eccleſiaſtical Perſons are expreſſly exempt from Reprizals.

A Merchant of another place than that againſt which Reprizals are granted, albeit the Factor of ſuch Goods were of that place, are not ſubject to Reprizals.

\* *Vita autem  
Subditorum in-  
nocentium, ut ex  
tali cauſa obli-  
gur, forte credi-  
tum fuit apud  
aliquos Populos,  
eo nimirum quod  
crederent unicui-  
que hominum ju-  
ris plenum eſſe  
in ſe. Et ad Rem  
publicam potuiſ-  
ſe transferri,  
quod minime eſſe  
probabile, nec ſan-  
ctiori Theologia  
conſentaneum.  
Grotius de Jure  
belli, lib. 3. cap. 2.  
ſſ. 4. And ſeems  
to be of opini-  
on by the Law  
of Charity, that*

XVII. Ships driven into Port by ſtorm or ſtreſs of weather, have an exemption from the Law of Reprizals, according to the *ſua Commune*; but by the Law of England otherwiſe, unleſs expreſſly provided for in the Writ, or Commiſſion.

But if ſuch Ship flies from his own Countrey to avoid confiscation, or ſome other fault, and is driven in by ſtreſs of weather, ſhe may then become ſubject to be prize.

But it is not lawful to make ſeizure in any Ports, but in his who awarded the Reprizal, or his againſt whom the ſame iſſued; for the Ports of other Princes or States, the *Peace of them* is to be maintained.

XVIII. \* Ships attacked by thoſe that have Letters of Reprize, and reſuſed to be yielded up, may be aſſaulted, and entered; and though it may fall out not by intention, but by accident, that ſome of thoſe that ſo reſiſt, may happen to be ſlain, yet the fault will lie at their own doors, for hindring the execution of Right, and that which the Law moſt juſtly approves of.

XIX. This right of changing of *Dominion*, is ſo odious, that in the taking of Goods, if by any poſſibility the right Owners may have reſtitution, the ſame has been done; and though a larger time than



than twenty four hours may happen between the capture and recapture, and so may *perish* with the Captor; yet restitution may be made:

the prosecution of Right for a Man's Goods, which inevita-

bly must be by the life of Man, ought to be omitted. *Lib. 2. cap. 10. Livy lib. 2.*

And therefore if he, who hath Letters of *Mark* or *Reprizals*, takes the Ships and Goods of that Nation, against whom the same are awarded, and brings the same into a *Newer Nation*, the Owners may there seize her, or there the *Admiral* may make restitution by Law; as well the Ship's Goods to the Owners, as the Persons captives to their former liberty; for that the same ought first to have been brought *infra Præsidia* of that Prince or State, by whose Subjects the same was taken.

*Barthol. in Leg. si quid Bello D. de cap. Ang. & Salic. in Leg. ab hostibus, C. de Capt. Const. Gall. 20 Tit. 13. Art. 24. Consul. Mar. 287. Trin. 17 Car. 1. in B. R. Marth Report. Res qua infra Præsidia perducta nondum sunt, quantum ab hostibus occupata, Dominum suum mutant, ex Gentium Jure.*

And with this agrees the *Common Law*; for a *Dunkirk* having taken a *French Vessel*, sold the same at *Weymouth*, whither it had been driven before it was brought *infra Præsidia Dom. Regni Hiss.* it was in such case rul'd, that if a Ship be taken by Piracy, or Letters of *Mark* and *Reprizal*, and is not brought *infra Præsidia* of that Prince or State, by whose Subjects the same was taken, the same could not become lawful prize, nor were the Owners by such a caption divested of their property.

But if the Caption be Ships of War, the property will be immediately in the Captors, and never divested, unless afterwards *vi manu & forti*, be in Battle regained.

XX. Upon the sharing the *Spoil* of the captivated Ships, regard is had to the Ships present, not the Captors only; for his reward must be the encouragement of his Prince, like the *Roman Coronas*, of which there were various, according to the atchievement of the Conquerour, in imitation of which our *Sovereign* in his Royal encouraging *Medals*, follows the example, to his deserving Commanders, as so many Ensigns to enflame Noble Souls to the performing Acts of Glory and Renown. I say the profits of Prizes are to be equally divided amongst the Ships present, and not solely to the Captor; for if Letters of *Reprizal* are granted to two Ships; and they happen both of them at Sea to meet a prize, and the one attacks and enters her, by means of which she becomes *absolute* the Conquerours; yet the other hath right to an equal distribution with the Captor, both in Ship and Goods, although he did nothing in the Conquest: the reason is, for although he miss the opportunity of taking her, yet the presence of his Vessel armed and prepared for Battle, at the time of taking, became a terror to the Ship that was so conquered: And by the Law presumed *sine ejus*, that the other

*Mich. 3a Eliz. Somers and Sir Ric. Bulckleya C. Leonard part. 181.*

Ship would not or could be so taken, which Law hath passed the current, and approbation of the *Common Law*, as reasonable, just and equitable, and may be pretended or surmised to entitle the party Captor, to the making restitution of a moiety to his Companion then present.

But if it should so happen, that those to whom Letters of *Mark* are granted, should instead of taking the Ships and Goods of that Nation, against whom the same were awarded, take or spoil the Goods of another Nation in Amity, this would amount to a downright Piracy. And the Persons offenders should for such fault create a forfeiture of their Vessel, and the Owners must be for ever concluded by the same, notwithstanding such *Commission*.

Trim. 3 Jac. in  
B. R. Rols fol.

530.

Sir, Francis  
Moors Rep. 1  
Jac. Waltham,  
vers Mulgar.

XXI. Therefore, Letters of *Mark* or *Reprisal* issue not without good and sufficient caution first given for the due observance thereof, according to Law; the transgression of which creates a forfeiture of the same.

And therefore, having taken a Prize, and brought the same *intra Presidia*, the Captor must exhibit all the Ship-papers, and captived Mariners to be examined in order to Adjudication, till when, Bulk ought not to be broken without *Commission*, nor may the Captor suffer an imbezement of the lading, or sell, barter, or dispose of any part, without *Commission*; for the King hath a proportion in all prizes.

3 B. R. 10 p. 5.

12 Carol. II.  
called the Act  
of Navigation.

Such Goods so brought in, are not subject to pay Customes.

XXII. By the Law of *Nations*, *ipso facto*, the Dominion of the things taken by those to whom Letters of *Mark* are granted, become the Captors, till the debt and costs, that is the original damage and subsequent charges are satisfied; which being done, the residue ought to be restored: So the *Venetians* used their equity, having taken the Ships of *Genoa*, did not spoil any of the lading; but preserved the same very carefully, till the debt being paid; which done, restitution was made of the things entirely, without diminution.

Gregorius l. 9.

XXIII. When for the fault perhaps of a few, a debt becomes *National*, by reason of which the Goods of the Innocent become lyaible (if taken for satisfaction) whether by the Law of *England*, the Party ought to have Contribution, most certain by the *Common Law*, where more are bound to one thing; and yet when one is put to the whole burden, the Party may have process called *Contributio-ne facienda*, for his relief: but when a debt becomes Universal or *National*, it seems otherwise, \* *For if one lends my Countrey money, I will not call my self debtor, yet I will pay my share*: so it may seem equitable by the Laws of Charity, though not compellable by the Laws of the Land.

Fitz-H. N. B.  
fol. 162. Old. N.  
Bre. 103. Reg.  
Orig. fol. 176.  
\* Seneca Benef.  
cap. 19.

XXIV. Yet

**XYIV.** Yet when depredations have happened to Foreign Merchants, and complaint hath been made, the Kings of *England* have often issued forth Commissions to enquire of the same: and so it was done upon the Petition of some Merchants of *Genoa*, who complain'd against the Inhabitants of the Isle of *Garnsey*, for a depredation, in taking away and detaining their Merchandize and Goods, to the value of many thousands of pounds, out of a Ship wracked by tempest near that Isle, by which the Commissioners were impow'd to punish the offenders, and to make restitution, satisfaction for the damages.

Pat. 16 E. 3.  
pars 1. m. 16.  
Dijrb.

The like complaint was made by the Merchants of the Duke of *Britain*, of certain depredations committed by the Subjects of the King of *England*, who issued forth the like Commission, and to give them reparation, and damages for the same; so that if the Subjects of the King of *England* have had their Goods by way of Reprize for the satisfaction of such debt or damage, they may have the benefit of the like Commissions, to lick themselves whole out of the Estates of the Offenders.

Pat. de An. 6 H.  
5. pars 1. m. 9.  
Dorſ. De caſeris  
perſonis arreſti.  
& capimul.

## C 3 CHAP.

## C H A P. III.

## Of Privateers or Papers.

- I. Of Privateers, whether allowable by the Laws of Nature.
- II. Of permission of such by the Laws of Nations.
- III. The occasion of their first Institution.
- IV. Whether it be lawfull to undertake such an Employment.
- V. Of Commissions general to endamage an Enemy.
- VI. Of Commissions special and to Privateers, and the immunities they claim by the same.
- VII. Of the care that obliges on the issuing forth such Commissions.
- VIII. Of Provisions made in reference to their regulating, and especially the last Treaty Marine between England and Holland.
- IX. Of Goods subject to prize, how considered in reference to adjudication general.
- X. Of the Goods considered in reference to adjudication, on occasions special.
- XI. Of the lading made prize, whether it draws in a forfeiture of the Vessel, and where otherwise.
- XII. Whether Ships refusing to yield up to such, lose it engaged.
- XIII. Privateers where subject to punishment, and their actions occasion a forfeiture of their Vessel.
- XIV. Of things not subject to spoil.
- XV. Considerations general on Privateers.

*Leg. servus. D. de Serv. export. DD. Ad Leg. si quis in servitutum. D. de fur. Leg. prohib. c. de Lure Fisci.*

*Bartol. in Leg. ut vim. D. de Lure c. 7. & 8.*

*Cicero Offic. 3.*

*The Son of Cato Censorius, having served as a*

I. **N**aturally every one may vindicate his own right, therefore were our hands given us but to profit another in what we can, is not only lawful, but commendable; since nothing is more serviceable to Man, than Man: Now there are divers Obligations between Men, which engage them to mutual Aid; for Kinmen assemble and bring help, and Neighbours are call'd upon, and fellow Citizens; for it behooves every one either to take Arms for himself, if it hath receiv'd injury, or for his Kindred, or for his Benefactors, or to help his Fellows, if they be wrong'd: And Solon taught, *That Common-wealthe would be happy, wherein every one wold think anothers injuries to be his own.* But when War is denounc't, it matters not what Obligations are wanting, it is enough the Nation is injur'd in general; for in that every individual is wrong'd, and all participate in the indignities and publick dammages of his Country; to revenge or prevent which, is the duty of every member of the same.

II. Since therefore it is not against the *Law of Nature* to spoil him, whom it is lawful to kill, no wonder that the Laws of Nations permitted the Goods and Ships of Enemies to be spoiled, when it suffered their Persons to be slain.

III. The approbation of which in the Wars of later Ages, hath given occasion to Princes to issue forth Commissions to endamage the Enemy in their Commerce, and to prevent such supplies as might streng-

strengthen or lengthen out War, to persons to whom the prize or  
 caption become absolute the Captors, and that to prevent the spare of  
 Ships of force to be absent from their respective Squadrons or Fleets.

By those of *Holland* were termed *Capers*; by the *Spaniards* they  
 had their denomination, from their respective parts, as *Offenders*,  
*Dunkirkers*, and the like, in *England* call'd *Privateers*: how far  
 the actions of those as in relation to the attacking and killing of the  
 Enemy, or spoiling of their Ships and Goods are lawful, not being  
 commanded nor hired thereto; may be some question.

General, that he should give him an Oath the second time; giving this reason,  
*amisso iure cum hostibus pugnare non poterat*: Cicero sets down the very words of *Cato* to his  
 Son, whereby he admonisheth him not to enter into Battle; *Neque enim jus esse qui miles non*  
*sit pugnare cum hoste*, Cic. Offic.

IV. By the Laws of Nations (as hath been said) it is lawfull for  
 every Subject of that Nation in War, to seize upon the Enemies  
 Goods and Ships; as also to kill them; for they are after War de-  
 nounc't by Law lookt upon as of no account, and if respect be had to  
 Natural and internal Right, it seems granted to every one in a Just  
 War, to do those things, which he is confident within the just mea-  
 sure of warring, be advantageous to the innocent party; but though  
 there may be such Authority given, yet what Little can they claim  
 or appropriate to themselves of the Ships or Goods of Enemies (for  
 surely there is nothing owing to such, nor are they lawfully call'd to  
 the same;) unless they can shrowd themselves under the protection  
 of what they do is only to exact punishment from the Enemy, by  
 the Common Right of Men.

V. Commissions to kill or spoil the Enemy, are in two respects;  
 either General or Special: General, as in a tumult; among the *Ro-*  
*mans*, the *Consul* said, *Whosoever would have the Common wealth*  
*safe, let him follow me*; and to all particular Subjects is sometimes  
 granted a right of killing in self-defence, when it is publicly expe-  
 dient, as on a sudden occasion, and the like.

VI. Special Commissions be such as are granted to those that take  
 pay, and are under Orders; the not obeying of which may be pun-  
 ished with death, though the act succeeds well.

Others to repair a particular damage by way of *Reprise*, the  
 original damage being turn'd into a National debt, but that sat-  
 isfy'd the other determines, or else to those who receive no pay, but  
 go to War at their own charge; and that which is more, administer  
 at their own costs a part of the War, by providing Ships of Force,  
 and all other Military Provisions to endamage the Enemy or their

private Souldier  
 of pay under  
*Pomilius*, the  
 Legion, being  
 disbanded, the  
 Young Man was  
 resolved to re-  
 main with the  
 Army, though  
 but a Volunteer;  
*Cato* wrote to  
*Pomilius* the  
 the

Leg. Desiderio  
 D. de re milit.  
 Leg. 1. 6. 2. 1. 6.



Confederates; the which are termed *Privateers*, &c. as above, to whom instead of pay is granted leave to keep what they can take from the Enemy; and though such Licence is granted them; yet may they not convert of their own head to their private use those prizes, before the same have been by Law adjudged lawful to the Captors, and the Admiral had his share.

VII. Nor may such Privateers attempt any thing against the Laws of Nations, as to assault or endamage an Enemy in the Port to Haven, under the Protection of any Prince or Republick, be he Friend, Allie or Neuter, for the peace of such Places must be kept inviolably.

Sir *Kenelm Digby* having obtain'd a Commission against the *French*, who being in the *Sireighes*, was every where honoured as a Cavalier whom the King of *Great Britain* favoured; in his Voyage he took some Prizes, and coming to *Algier*, redeemed several Captives, whom he took aboard, and placed in the several Vessels he had made prize of, the which he so effected, that in a short time he became *Illustissimo* of six Ships of War; coming to *Cape Conyare*, ten leagues from *Scanderoon*, and having sent a Boat to descry the Road, word being brought that there were in the Road two *Venetian* Galeasses, with two other Galeons, two *English* Ships, and several *French* Ships; Sir *Kenelm* being satisfy'd of the prize, resolv'd to attaque them the next Morning, although the Admiral of the *Venetians* having declared himself Protector of the *French*, and that he would destroy all the *English* Ships of War that he should meet, either in that *Republick* or *Grand-Seigniors* Seas. Sir *Kenelm* notwithstanding, resolv'd to engage them; and accordingly bore up to them, and the *Venetian* General weigh'd anchor to meet him; Sir *Kenelm* before he fired, sent a *Sally*, to inform the *Venetian* of his Quality, and of his Commission, *Being only to endeavour to make prize of the French*, and giving him all the assurance possible of his friendship, and respect to the Republick; but before the *Sally* was answer'd, the Engagement was begun by the *English*, *French* and *Venetian*. This Action of Sir *Kenelm Digby*, was question'd by the *Turk*; for that Hostility had been committed by the *English* in the *Grand-Seigniors* Road, and thereupon the *Bassa* of *Aleppo*, and *Cady* of *Scanderoon*, made an *Avenia* or *Embargo* on the *English* Merchants, till reparation was made, for the breaking the Peace of the Port.

VIII. In the granting of such private Commissions, there is always great care to be had and taken by caution, to preserve the Leagues of our Allies, Neuters and Friends, according to their various and several Treaties; and therefore at this day by the late Treaty between

This matter was highly debated at the Council board on the complaint of *London*, then Embassador for that Republick, at *London*, *Ann. 1619. Vido Hist. Republick. Venet. p. 170.*

tween His Majesty and the *States of Holland at London*, before any *Privateer* or *Caper* can receive Commission, the Commander is obliged to enter before a competent Judge, good and sufficient security by able and responsible Men, who have no part or interest in such Ship, in 1500<sup>l</sup> *Sterling*, or 15500 *Gilders*; and when they have above one hundred and fifty Men, then in 3000<sup>l</sup>, or 33000 *Gilders*, that they will give full satisfaction for any damage or injuries, which they shall commit in their Courses at Sea contrary to that Treaty, or any other Treaty made between His Majesty and that *State*, and upon pain of Revocation and Annulity of their Commissions, and for answering of such damage or injuries, as they shall do, the Ship is made lyaible.

*Treaty Marine at Lond. 1. of Decemb. 1674.* In the Commission must always be mentioned that they have given such security.

IX. If a Suit be commenced between the *Captor* of a Prize and the *Claimer*, and there is a Sentence or a *Decree* given for the party reclaiming; such Sentence or Decree (upon security given) shall be put in execution, notwithstanding the Appeal made by him that took the prize; which shall not be observed in case the Sentence shall be given against the Claimers; if torture, cruelty, or barbarous usage happens after a caption to be done to the persons taken in the prize, the same shall *ipso facto* discharge such a prize, although she was lawful, and the Captains shall lose their Commissions, and both they and the offenders be subjected to punishment.

*Art. 13.*

These Articles for their excellency are fit to be a Standard to all the Nations of Europe.

*Art. 14.*

X. Such sort of Instruments having made a caption of Ships bound for an Enemy from Nations Neuters, or in Amity with both the warring States; the lading in order to be made prize, is reduced to these three several heads:

First, those Goods that are fit to be used in War, under which are included Powder, Shot, Guns, Pikes, Swords, and all other Instruments and Provisions of Armature fit to be used in the Field or at Sea.

The second, are those things that may be used in time of War and out of War, as Money, Corn, Victuals, Ships, and the like.

And the last are those Goods, that are only fit for luxury and pleasure.

*In hostium esse partibus, qui ad bellum necessaria hostia administrat. Consulas Maris editus est Lingua Italica, in quem relata sunt constitutiones Imperatorum Gracia. Cuius libri tit. 276.*

XI. The first are accounted prize without controversy; *He is to be accounted an Enemy, that supplies an Enemy with things necessary for the War.*

The second is to be governed according to the state and condition

D

of

*Camden An.*  
1591. By the  
fourth Article  
at the Treaty  
ad Lond. 1674.  
those Goods that  
may be used out  
of war as in war,  
(except Ships)  
may not upon  
any account be  
call'd prohibi-  
ted, nor subject  
to a condemna-  
tion, except carried to Places besieged. *Art. 4.* See *John Mourusius* his *Danish History* concern-  
ing the Prohibiting of Goods by those Northern States. *Vide postea.* the Grand prize condemn-  
ed by *Queen Elizabeth* in *Tit. Customs.*

of the War; for if a Prince cannot well defend himself, or endan-  
mage the Enemy, without intercepting of such things, necessity  
will then give a right to the condemnation. And so *Queen Eli-  
zabeth* did the *Hansatique* Fleet taken, laden with Corn for *Li-  
baw*; upon consideration of the state of the War, the same be-  
came prize.

The last become free, according to that of *Seneca*; *I will not  
help him to Money to pay his Guards; but if he shall desire Marbles  
and Robes, such things hurt not others, only they minister to his lu-  
xury: Shoulders and Armes I will not supply him with; if he shall  
seek for Players and recreations so soon as his fervency; I will gladly*

*offer to him: Ships of War I would not send him, but such as are for  
pleasure and ostentation of Princes sporting in the Sea, I will not deny.*

And Persons so  
attempting to  
relieve an ene-  
my, may in some cases be punished, but if the same be done by necessity of Obedience, though  
the parties are much to be blamed, yet are they not to be punished; and so it was with those  
which relieved *Sir John Old-Castle*, with Provisions, being taken, were discharged.

XII. If a Privateer take a Ship laden wholly with Counterband  
Goods, both Ships and Goods may be subjected, and made prize.

But if part be prohibited Goods, and the other part are not pro-  
hibited, but such as according to the necessity of the War shall be so  
deemed, the same may draw a consequential condemnation of Ships,  
as well as lading.

By the 7th Arti-  
cle in the Treaty  
at London if the  
Skipper will de-  
liver out the  
prohibited  
Goods, the Ship may proceed with the rest in their Voyage or Course, as they please, and the  
Ship shall not be brought into Port.

If part of the lading are prohibited, and the other part are merely  
luxurious and for pleasure, only the Goods prohibited become pri-  
ze, and the Ships and the remainder become free, and not subject  
to infection.

*Nec res est mor-  
tuu aliena, inquit  
Augustinus, qui  
sui possessioni mu-  
rorum ambitum  
circumduxit: si aliquis ex ipsorum usu percussus intreat.* Publ. Epist. 154.

XIII. If such Ships shall be attacked in order to an examination,  
and shall refuse, they may be assaulted, like a house supposed to have  
Theeves or Pirats in it, refuses to yield up their Persons, may be  
broke up by the Officer, and the Persons resisters may be slain.

*Leg. 5. de Na-  
vicul. C. lib. 3.*

XIV. But if any of these Privateers wilfully commit any  
spoil, depredations or any other injuries, either on the Ships of  
our Friends or Neuters, or on the Ships or Goods of our own  
Subjects, they will notwithstanding they are not in pay, be subjected  
in

in some cases to death and other punishments, according to the demerits of their crimes, and perhaps may subject their Vessel to forfeiture.

Trin. 3 Jac. in  
B. R. Rolls 5. p.  
Abridg. f. 530.

And though by the Law of Nature the Goods of Enemies are to be spoiled as well as their Persons slain, yet some Goods and things seem exempted, and ought not to be spoiled, and therefore it is not lawful to land on the territories of our enemies to spoil places dedicated to God: though Pomponius observes, when Places are taken by the Enemy, all things cease to be Sacred, the reason given is, because the things which are call'd sacred, yet are they not indeed exempted from humane uses, but are publique. The Townsmen, saith Tacitus, opening their Gates, submitted themselves and all they had to the Romans, themselves were spared, the Town was fired, Pompey entered the Temple by the right of Victory, not as a suppliant, but as a Conquerour: and though that privilege may seem right by the Law of War to a Sovereign, or a General, that intends a Conquest, yet that power may not seem devolved to him, whose Commission is cautionally to endamage the enemy only, as in reference to his Commerce and Provisions of enabling them to withstand the War: Certainly, that Conquest is poor, whose Trophies and Triumphs are made up with Roofs, Pillars, Posts, Pulpits and Pews, and the spoil of Agriculture. Hence it is, that at this day, the King of France in Germany and Holland, accepts of Contributions, by which the Cities and Churches are not only spared; but even the Country men plough and sow as quietly as if there were no Armies in their Territories at all.

Pompon. Leg.  
cum loca D. de  
Religiosis.  
Tacitus Annal.  
13.

Wars and Victories most part consist in taking and overthrowing Cities, which work is not done without injury of the Gods, the walls of Cities and Temples of the Gods partake in the same ruine, the Citizens and Priests equally slaughtered; nor is the rapine of sacred riches and pro-

phane unlike: so many are the spoils of the Romans as their Trophies, so many are their Triumphs over Gods and Nations: and then goes further, *Tot manubia quot manent adhuc simulacra captivorum decorum. Mox & bene, quod si quid adversi Urbibus accidis, eadem clades Templorum qua & maximam fuerant.*

Even upon the same reason, that the Instruments of Husband-men are not to be taken for a pledge by the Civil nor Common Law. Leg. exenat. C. quarum pign. Coke sup. Littleton 47.

XV. Most certain, those sorts of Capers or Privateers, being Instruments found out but of latter Ages, and it is well known by whom, it were well they were restrained by consent of all Princes; since all good Men account them but one remove from a Pirat, who without any respect to the cause, or having any injury done them, or so much as hired for the service, spoil Men and Goods, making even a Trade and Calling of it, amidst the Calamities of a War, and driving a Commerce and Mart with the spoil, and that with as much

peace and content, as if they had never heard of tears, blood, wounds or death, or any such thing: such to expose their lives against Ships of the like kind, were both honourable and just, or those that should aid the Enemy with Goods prohibited as afore, such prizes were possessions most noble; but the Goods, Ships and Lives of the innocent, peaceable Traders to be exposed to rapine and spoil, renders them worse than the *Roman* Victors, by how much 'tis to kill without cause, Heads-men executing the guilty, they the guiltless.

It was a high necessity that enforced the *English* to commissionate such, the number of her then Enemies, covering the Sea, like the *Egyptian* Locusts; it were well they were rejected by consent, or if allow'd of, not subject to Quarter, when taken by Ships of War. A Trade that *St. Paul* never heard of, when he said, *Who goes to War at his own charge?*

1 Cor. 9. 7.

## CHAP. IV.

### Of Piracy.

- I. *Pirates what?*
- II. *Of the Duty incumbent on Princes and States, as in reference to such, and whether liable for the damages they commit.*
- III. *Pirates where they hold a Society, how the same is esteemed in Law, and of equality held by them.*
- IV. *Where such may obtain the right of Legation.*
- V. *Ships where liable for the redemption of the Master, who remains as a pledge for the freedom of the Ship and Lading, and where not.*
- VI. *An Oath given for the discharge of a Ship from Pirates to pay them a summe, whether the same ought to be performed.*
- VII. *Foreigners spoiled by English Pirates may pursue for Justice, within the Statute of 23 H. 2.*
- VIII. *Where the Subjects of a Foreign Nation committing Piracy may be punished for the same. And,*
- IX. *Piracy committed by the Subjects of a Nation in Enmity with the Crown of England, whether the same is Piracy, or otherwise punishable.*
- X. *Piracy committed in the British Seas,*
- properly punishable by the Crown of England, and not otherwise.*
- XI. *Piracy committed on the Ocean where the Pirates may be executed by the Laws of Nature.*
- XII. *Pirates overcome in the attempt, where the Captors may execute them without any Trial or Judgment.*
- XIII. *Pirates attempting to rob, commit a murder, whether all are principal, or only the slayer, and the rest accessories.*
- XIV. *If the Subjects of one Foreign Nation rob another, and bring the booty into England, whether the party injured may proceed Criminaliter for punishment, and Civiliter for restitution.*
- XV. *Pirates take only Men; and no part of the Lading, whether the same be Piracy.*
- XVI. *Where a Master may commit Piracy of these things that are committed to his charge, and where otherwise.*
- XVII. *Where Piracy may be, though there be nothing taken; and where Goods are taken out of a Ship, and no body in it.*
- XVIII. *The Captain and Crew of a Vessel,*



*Vessel; what have a Commission of reprisal commit Piracy, whether he that prepared the same, and employed them, ought to answer the damage.*

XIX. *Of Goods taken and retaken by a Friend, whether the property of the prize is altered.*

XX. *Of Restitution made of Goods taken and retaken from a Pirate, by the Law Maritime.*

XXI. *Of Restitution frustrated by the Common Law.*

XXII. *Of Piracy, as in reference to matters criminal, and how punishable by the Law in England.*

XXIII. *How the Statute of 28 H. 8. operates, as in reference to Piracies.*

XXIV. *Whether depredation in Ports within the Realm, remains Robbery*

*as the Common Law; or Piracy by the Law Maritime.*

XXV. *Where, benefit of Clergy is allowable to Pirates, and where not; and whether by the pardon of all felonies, Piracy is included.*

XXVI. *Whether attainder for Piracy works a corruption of Blood, and forfeiture of Lands.*

XXVII. *Goods taken at Sea and brought to Land, the parties may be indicted upon the Statute of 28 H. 8. cap. 15.*

XXVIII. *Where the Admiralty claiming with an original or a concurrent Jurisdiction, the Common Law will not intermeddle.*

XXIX. *How satisfaction of foldmans is paired to persons robbed, and how the offenders were punished.*

I. **A** Pirate is a Sea Thief, or *Hostis humani Generis*, who for to enrich himself, either by surprize or open force, sets upon Merchants and others trading by Sea, ever spoiling their lading, if by any possibility they can get the mastery, sometimes bereaving them of their lives, and sinking of their Ships; the actors whereof Tully calls Enemies to all, with whom neither Faith nor Oath is to be kept.

II. By the Laws of Nature Princes and States are responsible for their neglect, if they do not provide Ships of War, and other remedies for the restraining of these sort of Robbers; but how far they are bound either by the *Civil Law*, or *Common Law* of this Kingdom, may be some question: for it is agreed they are not the cause of the unjust Spoil that is committed by them, nor do they partake in any part of the plunder; but if a Prince or State should send forth *Ships of War* or Commissions for reprisal, and those instead of taking prizes from the Enemy, turn Pirates, and spoil the Subjects of other Friends; there has been some doubt, whether they ought not to make satisfaction to the parties injured, in case the offenders should prove unable: surely there is no more reason for this latter than the first; because Princes and States may give all their Subjects power to spoil the Enemy; nor is such a Permission any cause why damage was done to our Friends, when even private Men without any such Permission, might send forth *Ships of War*; besides it is impossible that Princes or States should foresee, whether they would prove such or not, nor can it be avoided, but we must employ such otherwise no *Army* or *Fleet* could be prepared; neither are to prevent the same, if possible. They are generally restrained by Proclamation when a War breaks forth, and commanded, that none presume to set forth, without a Commission.

If the offenders could be found, they ought to be yielded up to Justice; and if they have any Estate, the same ought to go towards the reparation of the damage.

Caution is commonly taken upon the giving forth of such Commissions to

*Constit. Gallia*  
*Tom. 3. tit. 3.*  
*Constitutione*  
*An. 1583. cap.*  
*44. Vide etiam*  
*tom. constit. 3.*  
*tit. 2. constit. An.*  
*1543. cap. 44.*  
*Vide 21. Art. at*  
*the treaty at Breda*  
*between Eng-*  
*land and Hol-*  
*land, and the 15th*  
*Article in the Marine*  
*Treaty at London*  
*1674. † Trin. 7 Jac. in B. R. Rolls*  
*f. 530. Vide Sir Francis Moore's Reports, 1 Jac. Waltham adversus Mulgar.*

Kings to be accused if their Souldiers or Mariners wrong their Confederates, contrary to their commands, though they are obliged to punish and yield up the offenders, and to see that legal reparation be made out of the Estate of the Pirates: If Letters of Marque or Repriзал be granted out to a Merchant, and he furnishes out a Ship with a Captain and Mariners, and they instead of taking the Goods or Ships of that Nation against whom their Commission is awarded, take the Ship and Goods of a Friend, this is Piracy; and if the Ships arrive in \* England, or in any other of His Majesties Dominions, the same shall be seized, and the owners for ever lose their Vessel. †

From hence it is, that Princes and States are very cautious upon this we call *Jeux Bells privati*, how they engage themselves, or those who seek reparation for wrongs before received; for the person injured governs not the action, but devolves the power to some other hired for that particular use, whose Law is no more than this, *There is most Right where is most Pay or Prize*: Unhappy state of Man, whose support and living is maintained only by expelling himself to death! a Calling that nothing can make it honest, but the highest Necessary or pious Charity. And therefore those that issue forth such sort of Commissions, generally take caution for their returning with in a convenient time, and not to wander in that unhappy condition.

III. Though Pirates are called enemies, yet are they not properly so termed: For he is an Enemy, says Cicero, who hath a Common wealth, a Court, a Treasury, Consent and Concord of Citizens, and same way, of occasion be, of Peace and League: and therefore a Company of Pirates or Free-boaters are not a Common wealth, though perhaps they may keep a kind of equality among themselves, without which no Company is able to consist: and though it is seldome they are without fault, yet hold Society to maintain Right, and they do Right to others, if not in all things according to the Law of Nature (which among many people is in part obliterated) at least according to agreements made with many other Nations; or according to Custom: So the Greeks at what time it was accounted lawful to take spoil at Sea, abstained from slaughter, and populations, and from stealing Oxen that plowed, as the Scholiast upon Thucydides observes, and other Nations living also upon the spoil when they were come home from Sea, sent unto the Owners to redeem (if they pleased at an equal rate) what they were robbed of at Sea, and at this day, if a Ship hath the Emperour of Barbary's

Pro

*Leg. Hostes de*  
*verb. signif.*

*Leg. Hostes de*  
*Captiv.*

Protection, the Pirates of that Nation (if they seize) will restore; and if there be no protection, yet if taken within sight of their Castles, the Prize is not absolute; but if resistance is made, and there be a Capture, then then becomes the Captors for ever; as the price of blood.

IV. Pirates and Robbers that make not a Society, or such a Society as the Law of Nations accounts lawful; are not to have any succour by the Law of Nations. *Tiberius*, when *Tacfarinas* had sent Legates to him, he was displeased that both a Traytor and a Pirat should use the manner of an Enemy; as *Tacitus* hath it; yet sometimes such Men (Faith being given them) obtain the right of Legation as the *Fugitives* in the *Pyrenean* Forrest; and the *Bandits* at *Naples*; and *Solyman* the Magnificent, having entertained *Barbarossa* the famous Pirat, sent word to the *Venetians*, that they should use him and esteem him no more as a Pirat, but one of their own Port.

V. If a Ship is assaulted by a Pirat, for redemption of which the Master becomes a Slave to the Captors; by the Law Maritime the Ship and Lading are tacitly obliged for his redemption; by a general contribution; but sometimes they are not.

But if a Pirat shall feign himself stranded, and to duceoy the Merchant Man for his relief, shall fire his Guns, or wave his Colours, who accordingly varies his course for his assistance; and the Pirat enters him, for redemption of which he becomes a Slave to the Pirat, there Contribution shall not be made; and if this Ship loses any of her Lading, the Master shall answer the same.

VI. A Pirat attacks a Merchant Man, and enters her, for Redemption of which the Master gives his Oath, at a time and place to pay the Pirat a summe certain; by some it hath been held, that the Master commits not perjury, if the price promised for redemption be not brought according to the Oath; because that a Pirat is not a determinate, but a Common Enemy of all, with whom neither Faith nor Oath is to be kept; but that is no reason for the assailing of the Vow: for though the Person be deficient; yet the Just God is concerned; nor can that Person that hath promised a thing, satisfy his Conscience after he hath once delivered it to him; to recover it back again; for the words in an Oath, as to God, are to be understood most simply, and with effect; and therefore he that returned secretly to the Enemy, and again departed; made not good his Oath concerning his return.

VII. If an *English* Man commit Piracy, be it upon the Subject of any Prince or Republique in Amity with the Crown of *England*, they are within the purview of the Stat. of 28 H. 8. and so it was held where one *Winnerson*, *Smith* and others had robbed a Ship of one *Matu-*

Leg. Bona fides,  
D. Expos.

On a Com-  
mission, grou-

ded on the *Stat.*  
awarded. *Rot.*  
*Admir.* 28 *Elix.*  
m. 23.

*Matutine Gattier*, belonging to *Bourdeaux*, and bound from thence with *French Wines for England*, and that the same was Felony by the *Law Maritime*, and the Parties were convicted of the same.

VIII. And so it is, if the Subject of any other Nation or Kingdome, being in Amity with the King of England, commit Piracy on the Ships or Goods of the *English*, the same is Felony, and punishable by virtue of the *Statute*, and so it was adjudged, where one *Capeleß* Captain of a *French Man* of War of about forty Tuns and divers others, did set upon four Merchant Men going from the Port of *Brissell* to *Carmarthen*, did rob them of about 1000*l.* for which he and the rest were arraigned, and found guilty of the *Piracy*.

*Rot. Admir.* An-  
no 28 *Elix.* m.  
24.

*Normandy* was lost by King *John*, and out of the leageance of the King of England, and they were as now accounted Aliens. 40. *Affis* places. 25. p. *Shard.* Vide 2 H. 5. cap. 6.

But before the *Statute* of 25 *Ed.* 3. If the Subjects of a Foreign Nation and some *English* had joyned together, and had committed Piracy, it had been Treason in the *English*, and Felony in the Foreigners; And so it was said by *Shard.* where a *Norman* being Commander of a Ship, had together with some *English* committed robberies on the Sea, being taken, were arraigned and found guilty; the *Norman* of Felony, and the *English* of Treason, who accordingly were drawn and hang'd.

But now at this day they both receive Judgement as Felons, by the *Laws Maritime*.

IX. If the Subjects in enmity with the Crown of England be Sailers aboard an *English* Pirat with other *English*, and then a robbery is committed by them, and afterwards are taken, it is Felony without controversie in the *English*, but not in the *Strangers*; for they cannot be tryed by virtue of the Commission upon the *Statute*, for it was no Piracy in them, but the depredation of an Enemy, for which they shall receive a tryal by Martial Law, and Judgement accordingly.

*Selden Mari*  
*Clausum*, lib. 1.  
cap. 27. *Cass* of  
*Reginor Grim-*  
*bald* in *tempor.*  
*Edw.* 1. Cited  
in 4. *Inst.* f. 142.  
in C. of the Ad-  
miralty.

*Injicere ma-*  
*num parca tra-*  
*xerunt debitu-*  
*sibi. & sermo-*  
*nis est iuris;*  
*nam manus in-*  
*jectio videtur.*

X. Piracy committed by the Subjects of the *French* King, or of any other Prince or Republique, in Amity with the Crown of England upon the *British* Seas, are punishable properly by the Crown of England only, for the Kings of the same have *ius regiminis domini-um exclusive*, of the Kings of *France*, and all other Princes and States whatsoever.

XI. If Piracy be committed on the *Ocean*, and the Pirats in the attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment, by hanging them up at the Main Yard end before a departure; for the old natural liberty remains in places where are no judgements.

And therefore at this day, if a Ship shall be in on a Voyage to the *West-*

*West-Indies*, or on a Discovery of those parts of the unknown World, and in her way be assaulted by a Pirate, but in the attempt overcomes the Pirate, by the Laws Maritime the Vessel is become the Captors; and they may execute such *Beasts of Prey* immediately, without any solemnity of condemnation.

XII. So likewise, if a Ship shall be assaulted by Pirates, and in the attempt the Pirates shall be overcome, if the Captors bring them to the next Port, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon them by the Law of Nature, and the same may be there executed by the Captors.

*rius publici tutelæ in medio constitutus, ne quis quàm sibi ipsi permittere valeat ultionem. Leg. nulli C. de Iudic.*

*Cajus Caesar* being but a Private Man, pursued the Pirates, by whom he formerly had been taken and spoiled by them, and making up to them with such a Fleet as he possibly in haste could get ready, attacked, burnt and destroyed their Ships, and the Men he brought back to an Ancor, where repairing to the *Præconsul* to do Justice, who neglecting, himself returned back, and there hang'd them up.

XIII. If a Pirate at Sea assault a Ship, but by force is prevented entering her, and in the attempt the Pirate happens to slay a Person in the other Ship, they are all *principals* in such a murder, if the Common Law hath Jurisdiction of the cause: but by the Law Maritime, if the Parties are known, they who gave the wound only shall be *principals*, and the rest *accessories*; and where they have cognizance of the principal, the Courts at Common Law will send them their accessory, if he comes before them.

XIV. If a *Spaniard* robs a *French Man* on the High Sea, both their Princes being then in Amity, and they likewise with the King of England, and the Ship is brought into the Ports of the King of England, the *French Man* may proceed *criminaliter* against the *Spaniard* to punish him, and *civiliter* to have Restitution of his Vessel: but if the Vessel is carried *intra Præsidia* † of that Prince, by whose Subject the same was taken, there can be no proceeding *civiliter*, and doubted if *criminaliter*; but the *French Man* \* must resort into the Captor or Pirates own Countrey, or where he carried the Ship, and there proceed.

A *Dutch Man*, but Naturalized by the Duke of Savoy, and living at *Villa Franca* in his Dominions, procures a Commission from the States of Holland, and coming to *Leighorn*, there rid with the Colours and Ensigns of the Duke of Savoy, the Ship *Dyanond*

E

being

*quaes nulla iudicis auctoritate, rem nobis debitam vindicamus. Servius l. 1. Aeneidos.*

*Leg. extas. D. quod metus.*

*Honorius & Theodosius: idcirco Judiciorum vigor in-*

*Nutarch in Caesar.*

*Ralph Williams* indicted for the murder of one *John Terrey*, and *Bridges*, *Black* and others, as accessory. *Rest. Admir. 28. El. m. 24.*

*Yel. f. 134. 135. Res que intra Præsidia perducta nondum sunt, quanquam ab hostibus occupata, dominum non mutantur ex Gentium jure. Groc. de jure Belli ac Pacis cap. 9 §. 16.*

† *Trim. 17. Car. in B. R. Marlin's Reports.*

\* *Leg. Hostes & Leg. Latrones D. de cap. Leg. postlim. à Piratis cod. Tit.*



The Capture being then in Port, and having received her lading, was afterwards in her Voyage home surprized by that Caper, and brought into *Villa Franca*, and there condemned and sold to one *Poleman*; which Ship afterwards coming for *England*. the Plaintiffs having notice, made a seizure, and upon Tryal Adjudication passed for the Plaintiffs, the original proprietors; for though the Ship of War and the *Tork*; but nothing came of it. *Rott. Admir. in an. supradict.*

Captors were of *Savoy*, and carried thither; yet being taken by virtue of a *Dutch Commission*, by the *Law Maritime*, she must be carried *infra Præsidia* of that Prince or State by virtue of whose *Commission* she was taken.

Nor can such carrying of the Ensigns or Colours, of the *Duke of Savoy*, who was then in Amity with the Crown of *England*, or the *Commander*, though a Subject of that Prince, make him a Pirate, or subject them or those to whom they have transferred their interest of the Prize any wayes to be questioned for the same *Criminaliter*; for that the Original *Quod* as to the taking was lawful, *as one Enemy might take from another*; but *Civiliter* the same, for that the Captor had not entitiled himself to a firm possession.

And therefore in all Cases, where a Ship is taken by *Letters of Marque or Piracy*, if the same is not carry'd *infra Præsidia* of that Prince or State, by whose Subject the same was taken, the Owners, are not divested of their property, but may re-seize wheresoever they meet with their Vessels.

XV. If a Pirate attacks a Ship, and only takes away some of the Men, in order to the selling them for slaves, this is a Piracy by the *Law Maritime*; but if a Man takes away a *Villain* or *Ward*, or any other Subject, and sells them for slaves; yet this is no robbery by the *Common Law*.

XVI. If a Bale or Pack of Merchandise be delivered to a Master to carry over Sea to such a Port, and he goeth away with the whole Pack or Bale to another Port, and there sells and disposes of the same, \* the same is no felony.

But if he opens the Bale or Pack, and take any thing out, *animus furandi*, the same may amount to such a Larceny, as he may be indicted in the *Admiralty*, though it amounts not to a Piracy.

Yet if such a Master of Ship shall carry the Lading to the Port appointed, and after retakes the whole Pack or Bale back again, this may

\* *Bullfred. 3. part. fol. 28. Case of Samuel Pellagry.*

\* *Grotius de Jure Belli ac pacis lib. 3. Cap. 9. §. 15. c. 16.*

\* *Mish. 8. lac. in B. R. Brownlow 2. part. Westons C.*

*Co. 3. Inst. 109. lib. 8. f. 33 B.*

\* *Calley's C. but Black Mails & such sorts of taking in Cumberland, Northumberland, and Westmerland was Felony. 43 Eliz. cap. 13. \* ff. Nautæ Caup. l. 1. sect. 3. Stab.*

*Glanvill. lib. 10. cap. 13. 13 E. 4. 9.*

*Nautæ Caup. Stab. lib. Sect. 7. sect. recept.*

may amount to a Piracy; for he being in the nature of a Common Carrier, the delivery had taken its effect, and the privacy of the Balement is determined.

XVII. If a Pirat shall attaque a Ship, and the Master for the redemption shall give his Oath to pay a summe certain; though there be no taking, yet is the same Piracy, by the *Law Maritime*.

If a Ship shall ride at Anchor, and the Mariners shall be part in their Ship-Boat, and the rest on the shore, and none shall be in the Ship, yet if a Pirat shall attaque her and rob her, the same is Piracy.

XVIII. A Merchant procures Letters of *Marque* or *Reprize*, and then delivers the Commission to Persons to endeavour a satisfaction; if such Persons commit Piracy, the Vessel is forfeited without controversie: but the Merchant is no wayes lyable to make satisfaction; for though the Superiour shall answer for the actions of his Ministers or Servants, yet that is introduced by the Civil Law; but this question must be decided by the Laws of Nations, by virtue of which such *Commissions* are awarded or granted; the which does exempt any Man to answer for the dammages of his Servants, unless he fore-knew that they would commit such a Piracy or Spoliation, or any way have abetted or consented to the same, which right may be forfeited, and the Civil Law let in to acquire satisfaction.

But if a Ship shall be at Sea, and in necessity, if she attacks another Ship, and takes out some Vistuals, Cables, Ropes, Anchors or Sailes, (especially if that other Ship may spare them) this is not Piracy; but then the party must pay ready Money for such things, or give a Note or Bill for the payment of the value, if on this side the *Straites of Adorocco*, within four months, if beyond, within twelve months.

XIX. By the *Law Maritime*, if Goods are taken by a Pirat, and afterwards the Pirat attaque another Ship, but in the attempt is conquered, the *Prize* becomes absolute the Captor's, saving the account to be rendred to the *Admiral*. And it is accounted in Law a just caption of whatsoever may be got, or taken from such *Beasts of prey*, be the same in their own or in their Successors possession.

But then an account ought to be rendred to the *Admiral*, who may (if they happen to be the Goods of the Fellow Subject of the Captors, or of Nations in Amity with his own Sovereign) make restitution to the Owner, the costs and charges, and what other things in equity shall be decreed to the Captor, first considered and deducted.

XX. By the *Statute* of 27 *Edw. 3. cap. 13.* If a Merchant lose his Goods at Sea by Piracy, or Tempest (not being wrackt) and they

Co. 3. Inst. 107.  
108.

44 E. 3. 14. 4 H.  
4. 2. §. ad Leg.  
Rhod. de fact. l.  
2. §. si navis à  
Pirata redempta  
fit. 14 E. 3. Cor.  
115.

Trin. 7 Jac. in  
B. R. Rolls A-  
bridg. 530.

Constit. Gallie  
tom. 3. tit. 3.  
Constit. Anni  
1583. c. 44.

Vide Sir Francis  
Moore Reports  
Waltham vers.  
Mulgar.

Leg. 2. §. Cum  
in eadem; D. ad l.  
Rhod. Leg. quo  
mausfrag. §. quod  
ait D. de incen.  
Leg. quemadmo-  
dum, §. item.  
D. ad Leg. Aquili-  
am. 27 H. 8.

cap. 4.  
Per Leg. Pom-  
pon. de acqu. rei  
dom.

Per Leg. Mulier  
ea. cap. 6. post.

27 E. 3. c. 13.

afterwards come to Land; if he can make proof they are his Goods, they shall be restored to him in places *Guildable*, by the King's Officers and six Men of the Countrey; and in other places by the Lords there and their Officers, and six Men of the Countrey.

This Law hath a very near relation to that of the *Romans*, called *De Usu-Captione*, or the *Atinian Law*; for *Atinius* enacted, that the Plea of Prescription or long Possession, should not avail in things that had been stoln, but the interest which the right Owners had should remain perpetual; the words of the Law are these, *Quod*

*Sironius de lute surreptum est, ejus rei eternitas Auctoritas esset*, where by *Auctoritas* is meant *ius Domini*.  
*Rom. l. 1 cap. 11.*

XXI. Yet by the *Common Law* of *England*, it has been held, that if a Man commit Piracy upon the Subjects of another Prince or Republique (though in League with us) and brings the Goods into *England*, and sells them in a Market *Overt*; the same shall bind, and the Owners are for ever concluded, and if they should go about in the *Admiralty* to question the property, in order to restitution, they will be prohibited.

*Mich. 13 Jac in B. R. Sir Richard Bingley's Case. Roll's Abridgement f. 530.*

XXII. This offence was not punishable by the *Common Law*, as appears by the preamble of the *Statute* of 29 H. 8. cap. 15. but the same was determined and judged by the *Admiral*, after the course of the *Civil Law*; but by force of the said *Act*, the same is enquired of, heard and determined according to the course of the *Common Law*, as if the offence had been committed on Land.

XXIII. This *Act* does not alter the offence or make the offence Felony; but leaves the offence as it was before this *Act*; viz. Felony only by the *Civil Law*, but giveth a mean of Tryal by the *Common Law*, and inflicteth pains of death, as if they had been attainted of any Felony done upon the Land.

The Indictment must mention the same to be done upon the *Sea*.

A Pardon of all Felonies does not extend to this offence, but the same ought *especially* to be named.

*Moore 756.*

Though there be a forfeiture of Lands and Goods, yet there is no corruption of Blood.

But if the party be attainted before the *Admiral*, and not before the Commisioners, then there is no corruption of Blood or forfeiture of Lands; *Quod nota Co. Inst. ces 1044.*

There can be no *Accessory* of this offence, tried by virtue of this *Statute*; but if there be an *Accessory* upon the Sea to a Piracy, he must be tried by the *Civil Law*.

The *Statute* of 35 H. 8. cap. 2. taketh not away this *Statute* for *Treasons* done upon the Sea, *Clergy* is not allowable to the party on the *Statute* 28 H. 8. vide 14 Jac. in B. R. *Moore 756. pl. nota Co. Inst. ces 1044.*

389.

Though a Fort is *Locum publicum uti pars Oceani*, yet it hath been resol-

resolved more than once that all Ports, not only the Town, but the Water is *infra corpus Comitatus*.

XXIV. If a Pirat enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, the Pirat assaults him and robs him, this is not *Piracy*, because the same is not done *super altum Mare*; but this is a down right robbery at the *Common Law*, for that the Act is *infra corpus Comitatus*, and was inquirable and punishable by the *Common Law*, before the *Statute* of 28 H. 6. cap. 13.

*Hyde* and others robbed the Ship of Captain *Sloe* of the Merchandise of one *Mr. Mors* a Merchant in London; and they were indicted for it at the *Common Law*, and were found guilty of the same. Anno 23 Car. 2.

detected for it at the *Common Law*, and were found guilty of the same. Anno 23 Car. 2.

XXV. So if such a *Piracy* be made in a *Creek* or *Port*, in such Cases it has been conceived, that *Clergy* is allowable upon the *Statute* of 28 H. 8. but if it be done *super altum Mare*, there no *Clergy* is allowable: by the Pardon of all Felonies, at the *Common Law*, or by the *Statute Law*, *Felony super altum Mare* is not pardoned; Sir *Lyonel Jenkins*, and the rest of the Lords the Judges, upon the *Piracy* committed by *Cusack* and others; and denied; and he was afterwards executed Anno 1674. Vide 19 E. 3. Cor. 124. 9. H. 4. 2.

And the same was so ruled by the Opinion of

for though the King may pardon this offence, yet being no *Felony* in the eye of the Law of this Realm, but only by the *Civil Law*, the Pardon of all Felonies generally extends not to it; for this is a special offence, and ought specially to be mentioned.

XXVI. A Man attainted by virtue of that Statute, forfeits his Lands and Goods, yet there works no corruption of Blood, by virtue of that attainder; nor can there be any Accessory of *Piracy* by the Law of this Realm: but if it falls out that there is an Accessory upon the Sea, such Accessory may be punished by the *Civil Law*, before the Lord *Admiral*, but he cannot be punished by virtue of this Act; because it extends not to Accessories, nor makes the offence *Felony*.

9 E. 4. 28. cited in *Cokes* 3. Inst. fo. 112.

XXVII. If one steals Goods in one County, and brings them into another, the Party may be indicted in either County; but if one commits *Piracy* at Sea, and brings the Goods into a County in *England*, yet he cannot be indicted upon that Statute, for that the Original taking was not *Felony*, whereof the *Common Law* took cognizance.

28 Eliz. Butlers Case cited 3. Inst. fo. 113.

XXVIII. If a Man is taken on suspicion of *Piracy*, and a Bill is preferred against him, and the Jury find *Ignoramus*; if the Court of *Admiralty* will no discharge him, the Court of *Kings Bench* will grant a *Habeas Corpus*.

Marsh's Case 13 Jac. in B. R. 3 Bulstrode. f. 27.

*Corpus*, and if there be good cause discharge him, or at least take Bayle for him: But if the Court suspects that the Party is guilty, perhaps they may remand him; and therefore in all Cases; where the *Admiralty* legally have an Original or a concurrent Jurisdiction, the Courts above will be well informed before they will meddle.

\* Yelverton  
134. 135. *Scadings* Calce. *Tench*  
verl. *Harrison*  
B.R. *Styles* 171,  
340.

† 50 E. 3. par. 2.  
Dor. 24. de au-  
diendum & ser-  
minandum Mer-  
catoribus super  
mare illo pradatis.  
Pat. 6 E. 1. m. 24.  
Dor. the Case of  
Will. de Dunsta-  
ple a Citizen of  
Winton.

Pat. 32 E. 1. m. 4.  
Dor. pro Williel-  
mo Perin & Do-  
mengo Perez  
Mercatoribus.

If a Man be in custody for Piracy, if any aids or assists him in his escape, though that matter is an offence at Land, \* yet the *Admiralty* having Jurisdiction to punish the Principal, may have likewise power to punish such an offender, who is lookt upon *quasi* an Accessory to the Piracy; but to rescue a Prisoner from an Officer of theirs, they may examine the Cause, but they cannot proceed criminally against the Offender.

XXIX. † Anciently when any Merchants were robbed at Sea, or spoiled of their Goods, the King usually issued out *Commissions* under the *Great Seal of England*, to enquire of such depredations and robberies, and to punish the Parties; and for frauds in Contracts, to give damages to the Parties, and proceed therein *secundum Legem & consuetudinem Anglia, secundum Legem Mercatoriam, & Legem Maritimam*; all three Laws included in the *Commissions*.

One *Marsh* a Fisherman being at Sea, was taken by *Pirats*, and all which he had; after that, the *Pirats* took another Ship belonging to the *Dane*, and the *Pirats* having rifled the Ship, and taken the best of the Goods of the *Danes*, the *Pirat* put aboard the Fisherman, and so suffered him to depart, who landing here, went immediately to D<sup>r</sup> *Talbot*, a Civilian, and shewed him all this matter, and desiring his advice, who directed an Inventory to be made of the *Danes* Goods in his Ship; the *Dane* afterwards coming into *England*, and having intelligence of the matter, prosecuted the Fisherman in the *Admiralty*; and although *Ignoramus* was found, yet they there detained him; upon which a *Habeas Corpus* was prayed, but denied by My Lord *Coke* Chief Justice, for no other reason, but because the truth of the matter was opened, which gave the Court cause to suspect him of *Piracy*; otherwise if he had moved barely upon the *Ignoramus* found, *quod nota, Pasch. 13 Jac. in B. R. the King vers. Marsh, Bulstrode* 3. part. fol. 27.



## C H A P. V.

The Right of the *Flagg*, as to the acknowledging the Dominion of the *British Seas*.

I. Considerations general as in reference to the same.

II. Whether Princes may have an exclusive property in the Sea.

III. That such an exclusive Dominion may be, and proved.

IV. Of the Sea, whether capable of Division, as the Land general.

V. Considerations general as in reference to Maritime Cities touching Sea-Dominion.

VI. Of the Sea, by reason of its instability, whether capable of subjection.

VII. Of the Dominion of the British Sea asserted long before, and ever since the Conquest of this Isle by the Romans.

VIII. The Duty of the *Flagg*, but a consecutive acknowledgement of that

Right, and of the Ordinance of *Hastings* declaring that Customary obedience.

IX. Considerations had on some Treaties, in reference to the asserting the Duty of the *Flagg*.

X. Of the extent how far that Duty is required and payable.

XI. Of the Duty of the *Flagg*, not a bare Honourary Salute, but a Right.

XII. Of the importance and value of the same as well in Nations Forraign, as in England.

XIII. Of the Duty of the *Flagg*, not regarded as a Civility, but commanded as a Duty.

XIV. Of the importance of that acknowledgement.

I. **A**fter the Writings of the *Illustrious Selden*, certainly it's impossible to find any Prince or Republick, or single Person induced with Reason or Sense, that doubts the Dominion of the *British Sea*; to be intirely subject to that *Imperial Diadem*, or the Duty or Rights of the *Flagg*, which indeed is but a consecutive acknowledgement of that ancient Superiority, yet there have not been wanting some, who though they have not questioned the former, have highly disputed the latter.

But there are some fatal periods amongst our *Northern Regions*, when the Inhabitants do become so brutal and prejudicate, that no obligation of Reason, Prudence, Conscience or Religion can prevail over their passions, especially if they become the devoted *Mercenaries* of an implacable *Faction*; in opposition to all that can be called either Just or Honourable, we need not rip up the carriage of that late insolent Son of a *Tallow Chandler*, whose deportments made him no less insupportable at Home, than he was amongst *Foreign Princes*; the testimonies of his greatest Parts and Abilities, being no other than monuments of his *Malice* and *Hatred* to this Nation, and records of his own folly: But Princes are not to be wrangled out of their Ancient Rights and Regalities by the subtil argu-

Loveſtein.

argument of *Wis* and *Sophistry*; nor are they to be supplanted or overthrown by Malice or Arms, so long as God and Good Men will assist, in which His Sacred Majesty did not want, when he asserted his Right with the Blood and Lives of so many thousands that fell in the dispute.

II. That Princes may have an *exclusive property* in the *Sovereignty* of the *several parts* of the *Sea*, and in the *passage*, *Fishing* and *shores*; is so evidently true by way of fact, as no Man that is not desperately impudent can deny it; the considerations of the general practice in all Maritime Countries, the necessity of *Order* in mutual Commerce, and the *Safety* of Mens persons, Goods and lives, hath taught even the most *Barbarous Nations* to know by the Light of *Humane reason*, that *Laws* are as equally necessary for the Government and Preservation of the Sea, as those that negotiate and Trade on the firm Land; and that to make *Laws* and to give them the *Life* of Execution, must of necessity require a *Supream Authority*, for to leave every part of the Sea and Shores to an *Arbitrary and Promiscuous use*, without a correcting and securing Power in case of wrong or danger, is to make Men with the like condition of the Fishes, where the greater devour and swallow the less.

III. And though the Sea is as a *High way*, and common to all; yet it is as *other high-ways* by Lands or great Rivers are, which though *Common and Free*, are not to be *usurped* by private Persons, to their own entire service; but remain to the use of every one, not that their Freedom is such, as that they should be *without Protection or Government* of some Prince or Republique, but rather not *exclude* the same; for the true Ensign of Liberty and Freedom is *Protection from those that maintain it in Liberty*.

See that Plea of  
Chizzola for  
the Venetian So-  
veraignty of A-  
driatique Sea, at  
the end of Mr  
Selden.

IV. And as the Sea is capable of Protection and Government, so is the same no less than the Land subject to be divided amongst Men, and appropriated to *Cities and Potentates*, which long since was Ordained of God as a thing most natural. Whence it was that *Aristotle* said, *That unto Maritime Cities the Sea is the Territory, because from thence they take their sustenance and defence*; a thing which cannot be unless part of it might be appropriated in the like manner as the Land is, which is divided betwixt Cities and Governments; not by equal parts, or according to their greatness, but according as they are able to Rule, Govern and defend them. *Berne* is not the greatest City of *Switzerland*; yet he hath as large Territory as all the rest of the twelve *Cantons* put together: The Cities of *Norremberg* and *Genoa* are very rich and great, yet their Territories hardly exceed their Walls: and *Venice* the Mistress and Queen of the *Me-  
diter-*

*discrepancy*; was known for many years to be without any manner of possession in the firm Land.

V. Again on the Sea; certain Cities of great force; have possessed large quantities thereof; others of little force, have been contented with the next Waters.

Neither are there wanting examples of such, notwithstanding they are Maritime; yet having fertile Lands lying on the back of them, have been contented *therewith* without ever attempting to gain any Sea Dominium; others who being *swayed* by their more mighty Neighbours, have been constrained to *forbear* any such attempt; for which two causes, a City or Republique, though it be Maritime, yet it may remain without any possession of the Sea. God hath Instituted *Principalities* for the maintenance of Justice to the benefit of Mankind; which is necessary to be executed as well by Sea as by Land: Saint Paul saith, that for this cause there were due to Princes *Customs and Contributions*.

*competit actio injuriarum, l. 20 si quis in mare, d. injuriarum, sect. ult. de injuriis. Sin littora quoque communia sunt, l. 2. de divis. Quia accessorium sunt mari, & accessorium sequitur naturam Principalis, l. 2. de peculis, legat. c. accessorium de reg. jur. in 6. Ad litum mari igitur accedere quis potest, non solum tantum gratia, sed etiam adificandi & occupandi causa, l. quod in lit. de acquit. rer. Dom. in lit. ff. nequid in loc. pub. Fe. Angelus l. C. de reprob. Hanstat. par. 6. ff. 89. Edit. Præfatos. Ann. Dom. 1641. But these Arguments were easily answered by the Venetian Lawyers; Quemadmodum communio littorum restringitur ad populum, a quo occupata sunt, lib. 2. sect. littora D. de, quid in loc. pub. Ita etiam communio maris: adeo ut per mare a nemine occupatum navigatio sit omnino libera: per mare autem occupatum ab aliquo Principe it liberam habent navigationem qui sunt illi Principi subjecti; alii vero estuunt, quatenus idem Princeps permittit. Julius Pacius Deim. mari Adriat.*

It would be a great absurdity to praise the well Government and Defence of the Land, and to condemn that of the Sea; nor doth it follow because of the vastness of the Sea, that it is not possible to be governed and protected, but that proceeds from a defect in Mankind; for Deserts though part of Kingdoms, are impossible to be governed and protected, witness the many Deserts of *Africa*, and the immense vastities of the *New World*.

VI. As it is a gift of God, that a *Land* by the Laws and publique Power be Ruled, protected and Governed: so the same happens to the *Sea*; and those \* are deceived by a gross equivocation, who averre, that the *Land* by reason of its *stability* ought to be subjected, but not the *Sea*, for being an unconstant *Element*, no more than *Air*; forasmuch as they intend by the *Sea* and the *Air* all the parts of the fluid *Elements*, it is a most certain thing, that they cannot be brought under *Subjection* and *Government*, because whilst a Man serves himself with any one part of them, the other escapes out of his *Power*; but this chaunceth also to *Rivers*, which cannot be detained; but when one is said to Rule over a *Sea* or *River*, it is

The substance of what was alledged by the *Hanstatique* Towns, at the *Venetians* asserting of the Sovereignty of the *Adriatique*. Inter res communes, nisi ipse imperator numerat mare. & ideo nemo in mari piscari, aut navigare praescribitur, & adversus jus inibi essentis.

Quod notetur, aut aliter in Titulo 8. de libertate maris.

\* Grotius mare lib. Communio parit discordiam: quod communiter possidetur, vitio naturali negligitur: Habet communio rerum gerendarum, if. facultatem, Leg. pater. & diligente me Lig. 2.

understood not of the *Elements*, but of the *Seas* where they are placed: the *Water* of the *Adriatique* and *British Seas* continually runs out thereof; and yet is the same *Sea*; as the *Tiber*, *Pro*, *Rhine*, *Thames* or *Seynne*, are the same *Rivers* they were a thousand years since; and this is that that is subject to Princes by way of *Protection* and *Government*.

Again; it would seem ridiculous if any Man would assert that the *Sea* ought to be left without *Protection*; so that any one might do therein wall or ill, robbing, spoiling, and making it unnavigable, or whatsoever should seem fitting in their eyes; from all which it is apparent, that the *Sea* ought to be governed by those to whom it is most properly appertains by the Divine disposition.

VII. When *Julius Caesar* first undertook the Invasion of this *Isle*, he summoned the Neighbouring *Gauls* to inform him of the *Shores*, *Ports*, *Flavens* and other things convenient that might accelerate his intended *Conquest*, but from them nothing could be had, they answering, All Commerce and Traffique, and visiting their *Ports* was interdicted to all Nations before *Lucerne* had; nor could any but Merchants visit the same, and then had they places\* alligned them whether they should come; nor was this Dominion that the *Britans* then used, commanded without a *Naval Force*; the sight of which when *Caesar* saw, he preferred them before those of the *Romans*: for upon that occasion it was that *Caesar*, having seen those *Auxiliary Squadrons*, which the *Britans* sent the *Gauls* in their Expeditions against the *Romans*, took occasion to find out that warlike People, whose bare *Auxiliary aid* shook the Flower of the *Roman Squadrons*.

And when the *Romans* became *Conquerours* of this *Isle*, the same *Right* or *Dominion* was during all their time, supported and maintained when they sailed round their new achieved *Conquests* in the time of *Domitian*, *Agricola*, giving terror to all the Neighbouring Nations.

But when that *Mighty Empire* became subject to Fate, this *Nation* by the continual supply of Men, which went out of the Kingdom to fill up the Contingencies of the *Roman Legions*, became at last so enfeebled as to render us a prey to the *Saxon*; which *Empire* when having settled Peace with their *Danish* Neighbours, and quieted their own home, bred quarrells; and having reduced the several petty Kingdoms of their *Hierarchy* under one *Diadem*, they forgot not to assume their Ancient *Right and Dominion of the Seas*; as did the most Noble *Edgar*, who kept no less a number than four hundred *Sail of Ships* to vindicate and ascertain his *Dominion*, giving

\* *Qua omnia fore Gallis erant incognita. neque enim veniebat prae- ter mercatores adit ad illos quisquam. neque eis ipsis quidquam prae- ter oram maritimam atque eas Regionis quae sunt contra Galliam. notum est.* Com. Gall. Bell. lib. 4. fol. 72. m. 8.

\* *Gauls Town* near *Larmouth*, being then, as is conceived, one of the common places of *Mart* or *Commerce* for the *Gauls*.

*Quod omnibus fore Gallis habitibus nostris inde sub ministrata auxilia intelligebat.*

*Tacit. in vita Agricol.*

*Alfionensis Dri largi-fus.*

ing protection to the peaceable, and punishment to the offender: nor did his Successors *Ethelared, Canutus, Edmund*, and those that followed of the *Danish Race*, any wayes wave, relinquish or lose that Royalty; but obsequiously maintained the same down to the Conquerour, and from him since for some upwards of twelve hundred years in a quiet and peaceable possession.

*clementia, qui est Rex Regum, Ego Edgarus Anglorum Basileus omniumque rerum Insularum Oceani quæ Britanniam circumjacent, cunctarumque Nationum quæ infra eam includuntur, Imperator & Dominus, ex Chart. fundam. Eccles. Wigor. Sir John Burroughs fol. 11. Item quoque Edgarus 400 Navis congregavit, ex quibus omni anno post Festum Paschale 100. Navis ad quamlibet Anglia portem statuit; sic Æthelstani Insulam circumnavigavit. Hymenæo quoque judicium in Provincia exercuit, ex Ranulph. Cestrenf. fol. 11. J. B.*

To mention the Ancient *Commissions*, and exercise of this Sovereign Power, *Safe-Conducts, Writs of Seizure, Arrests, Records of Grants*, and *Licences* to pass through the Sea, and to fish, *Parliament Rolls* and the like, † would make a Volume; in a word, if *Right of Prescription, Succession of inheritance, continual claim, matter of fact, consent of History, and Confessions*, even from the mouths and pens of *Adversaries*, be of any moment to the asserting of a Title, his Sacred Majesty may be presumed to have as good a Title to that, as the most absolute Monarch this day on Earth, hath to what ever he can claim or does enjoy.

† So fully proved by Mr. Selden, that it would be impertinent in this Tract to rehearse the Authorities he vouches.

VIII. Now the Duty of the *flagg* is no more but a consecutive acknowledging of that *Right and Dominion* of the *British Seas* (not as a bare *Honorary Salute* or *Ceremony*, but as an *absolute sign* of the *Right and Sovereignty* of those *Seas* where they are obliged to strike Sail) that are in him to whole *Flagg* they Vail, and pay that Duty to; and in substance is no more but that the King grants a general Licence for Ships to pass through his Seas, that are his Friends, paying that Obeysance and Duty, like those Services when Lords grant out Estates, reserving a *Rose* or *Pepper Corn*, the value of which is not regarded, but the remembrance and acknowledging their *Benefactors Right and Dominion*.

*Vide Fac. Off. s. ruius Armach. Episc. Hibernia Sylloge p. 121, 163.*

That this hath been an *Ancient Custome*, alwayes waiting on that Sovereignty, appears by that memorable Record upwards of four hundred years since made, where it is declared by King *John* what the *Ancient Custome* was in these words; That it is a *Privilege* in any *Wopage*, being Ordained by Common Council of the King, do encounter upon the Sea any Ships or Vessel, laden or unladen, that will not strike and bail their Bonets at the Commandment of the Lieutenant of the King, but will fight against them of the fleet, that if they can be taken, they be reputed as Enemies, and their Ships, Vessels and Goods taken and forfeited as the Goods of Enemies, although the Masters or Pilots

*Inter Leges Maritimas sub fine Anno regni Regis Johannis secundo, entitled Le Ordinance al Hastings.*



lessors of the same would come afterwards, and alledge, that they are the Ships, Vessels and Goods of those that are Friends to our Lord the King, and that the Common People in the same be chastised by imprisonment of their Bodies for their Rebellion: by discretion.

Thus this *Inmemorial Custom* was by that prudent Prince affirmed, the which hath been alwayes before, and ever since, (without interruption by all Nations) constantly pay'd to the *Ships of War*, bearing the *Royal Standard* and other of His Majesties *Ships*, wearing his *Colours* and *Ensigns of Service*; he knowing that undoubted *Maxime of State*, that *Kingdomes* are preserved by *Reputation*, which is as well their strongest support in Peace, as their chiefest safety in time of War, when once they grow Despised, they are either subject to *Foreign Invasions*, or *Domestique Troubles*, the which (if possible) that Prince would have prevented, but he lived when those Celestial Bodies which govern the Actions of Princes seemed to frown on the most Virtuous and Wise.

IX. And as there is no Nation in the World more tender and jealous of their Honour than the *English*; so none more impatiently tolerate the diminution thereof. Hence it was that in all Treaties before almost any other thing was ascertained, the *Dominion of the Sea*, and striking the *Top-sail* was alwayes first provided for.

In the Year 1653, after the *Dutch* had measured the length of their Swords with those of this Nation, and being sensible of the odds, and having by their four *Embassadeurs* most humbly besought Peace, this very Duty of the *Flagg* was demanded by the 15<sup>th</sup> Article, in these words:

15th November  
1653.

That the Ships and Vessels of the said United Provinces, as well Men of War as others, be they in single Ships, or in Fleets, meeting at Sea with any of the Ships of this State of England, or in their service, and wearing the flagg; shall strike the flagg, and lower their Top-sail, untill they be passed by, and shall likewise submit themselves to be visited if thereto required, and perform all other respects due to the said Commonwealth of England, to whom the Dominion and Sovereignty of the British Seas belong.

This was so peremptorily demanded, that without the solemn acknowledging of the Sovereignty over the British Seas, there was no Peace to be had; that as to the acknowledging of the Sovereignty and the Flag, they were willing to continue the Ancient Custom, but that of Visiting was somewhat hard: 'tis true the latter Clause was by the Usurper waved; for reasons standing with his private interest; but the first was made absolute, by the 13<sup>th</sup> Article between  
Leo ab Atzema.  
fol. 847.

Him

*Him* and that *Republique*, and from thence it was transcribed to the 10<sup>th</sup> Article of *White-hall*; and afterwards into the 19<sup>th</sup> Article at *Breda*; and from thence into the 6<sup>th</sup> Article made last at *Westm.* and that Clause of searching of each others Ships made reciprocate, by the 5<sup>th</sup> Article made in the Marine Treaty at *London*; but that extends not to Ships of War, but only the Ships of Subjects.

14<sup>th</sup> September  
1662.

December the  
18<sup>th</sup> 1674. S.V.

X. By the *British Seas* in the Article about the *Flagg*, are meant the *Four-Seas*, and not the *Channel* only; for in the 16<sup>th</sup> Article they did expresse what was meant by the *British Seas*. †

That the Inhabitants and Subjects of the United Provinces may with their Ships and Vessels furnished as Merchant Men, freely use their Navigation, sail, pass and repass in the Seas of Great Britain and Ireland, and the Isles within the same, commonly called the *British Seas*, without any wrong or injury to be offered them by the Ships of this Common-wealth; but on the contrary shall be treated with all Love and friendly Offices, and may likewise with their Men of War—not exceeding such a number as shall be agreed upon—sail, pass and repass through the said Seas, to and from the Countries and Ports beyond them; but in case the said States General shall have occasion to pass through the said Seas with a greater number of Men of War, they shall give three Months notice of their intention to the Common-wealth, and obtain their consent for the passing of such a Fleet, for preventing of Jealousie and misunderstanding betwixt the States by means thereof.

† But now by the last Treaty at *Westmin.* the Dominion is ascertained from *Cape Finisfarre* to the middle Point of the Land *Van Staten* in *Norway*, 9. Feb. 1673. Artic. 16<sup>th</sup> in the Treaty of 15<sup>th</sup> Nov. 1653.

The first part of this Article doth plainly set out the extent of the *British Seas*, and that it is not the bare *Channel* alone that comprehends the same, but the *Four Seas*, and the same is further explained in the Great Case of *Constables*, † where the Dominion of the *Queen* (before the Union) as to the Seas, did extend mid-way between *England* and *Spain*; but entirely between *England* and *France*; for the *French* never had any Right or Claim to the *British Seas*: For in the Wars between *Edward* the First and *Philip* the Fair, (all Commerce on both sides being agreed to be free, so that to all Merchants whatsoever, there should be *inducia*, which were called *sufferantia Guerra*, and Judges on both sides were appointed to take cognizance of all things done against these *Truces*, and should exercise *Judicium secundum Regem Mercatoriam* & *formam sufferantia*: it was contained in the first provision of that League, that they should defend each others Rights against all others; this afterwards occasioned the introducing that Judgement in the same Kings time, (before those Judges, chosen by both the said Princes, by the Proctors of the Prelates, Nobility, and High Admiral of *England*, and all

† *Hill.* 20 El. B R the *Queen* and Sir *John Constables Case*. Leonard 3. part 72.

*Seld. de Dom. maris* l. 2. cap. 14 27. 2.

*Cooke* 4. Inst. fol. 142.

the Cities, Towns and Subjects of England &c. unto which were joyned the suffrages of the most Maritime Nations, as Genoa, Catalonia, Spain, Almain, Zeland, Holland, Denmark and Norway, and divers other Subjects of the Roman Empire, against *Reginer Grimbold*, then *Admiral of France*, for that there being Wars between *Philip King of France* and *Guy Earl of Flanders*, he had taken Merchants upon those Seas, in their Voyage to *Flanders*, and despoiled them of their Goods, whereas the Kings of England and their Predecessors, (as they all joyntly do declare and affirm without all controversy beyond the memory of Man,) have had the Supreme Government of the English Seas, and the Islands thereof.

*Prescribendo scilicet Leges, Statuta atque interdicta armorum, naviumque alio ac Mercatorum armamentis instructarum, causationes exigendo, tutelam prebendo, ubicunque opus esset, atque alia constituendo quaecunque fuerint necessaria ad pacem, jus & aequitatem conservandam inter omnimodas rates tam exteras quam in Imperio Anglicano comprehensas qua per illud transferantur; supremam iisdem item fuisse atque esse tutelam; merum mixtum Imperium in iure dicendo secundum dictas Leges, Statuta, prescripta & interdicta, aliisque in rebus qua ad summum Imperium attinent in locum adjudicatu.*

An Universal  
Consent of all  
Nations.

4. Instit. 142.  
6. Idem cap. 27.  
Mare clausum.  
Sir John Bur-  
roughs fol. 42.

By which memorable Record, it apparently shews that the Kings of England have had *istud regimen & dominium exclusivum* of the King of France bordering upon the same Seas, and of all other Kings and Princes whatsoever: and it was there adjudged that *Grimbolds* Patent was an usurpation on the King of England's Dominion, and he adjudged to make satisfaction, or if he proved unable, then the King his Master should, and that after satisfaction he rendered to punishment.

And as to the second part of the *Articles* of giving notice, it was but an Act of common prudence, their late unexpected visit which they then gave, put the *English* to some surprise; but they facing the *Batavian*, soon made them know that they were as capable of beating them home, as they were then daring in coming out, and were not to be braved out of a *Dominion and Right*, which their Ancestors had with so much Glory acquired and asserted.

Anno 1635.

Leo ab Aitzma  
Hist. Trans. pacis  
Belgi. pag. 177.  
Edit. Lugduni  
Batavor. quarto  
1654.

XI. By the *Article* of the Offensive and Defensive League between France and the United Provinces, it was agreed, That if at any time the Dutch Fleet (— which were to scour the French Coasts in the Mediterranean from Pirats) should at any time meet the French, the Admiral of the Dutch was to strike his Flag and lower his Top-Sail at his first approach to the French Fleet, and to salute

salute the *Admiral of France* with Guns, who was to return the said salute by Guns also, as was usual when the *Dutch and English Fleet* did meet.

Only in this the Right of the *Flagg* of *England* differs from that claimed by the *French*; for if there had been a failer on the part of the *Dutch*, of paying that respect to the *French*, the same would have amounted to no more but a breach of the *League*: but the not striking to the King of *England's Flagg*, is open *Rebellion*; and the *Archie* does so signify, for it is there mentioned as a *Right and Sovereignty*, not a bare *Dominion* only, like that of *Jerusalem* to the King of *Spain*.

XII. The Duty of the *Flagg* that hath been so constantly pay'd to our *Ancestors*, is of such advantage to the continuing the Renown of this Nation, that it serveth to imprint new *Reverence* in *Foreigners* that render it, and adds new *Courage* to those of our *Sea Men* that exact it; and since we know how much it imports a *State* that it be *Reverenced abroad*, and that *Repute* is the principal support of any *Government*, it equally influenceth the Subjects at *Home* and *Foreign Allies* abroad: And as there is no Nation in the *World* more tender of their Honour than the *English*, so none more impatiently tolerate the diminution thereof. With what resentments would not only the more *Generous and Noble*, but even the *Popular and Vulgar Sea Men* detest this, or any succeeding Age, should they remit or lose that *Rogality*; those Acknowledgements which their Predecessors with so much *Glory* asserted, and the neglect whereof was always punished as open *Rebellion*: the indignity of such an Action being sufficient to inflame the whole Kingdom, the consideration of which, besides His Sacred Majesties own Royal inclination to the same, and his evident Testimonies never to abandon a Ceremony of so high a concernment; witness the exposing the one half of his own heart, his *Royal Highness*, in the asserting the same, with such *Fleets*, and in such *Battles*, that no Age or Time can shew a memorial of the like, are Causes sufficient to create to us new flames of Love to those *Royal Patrons*, and Defenders of our *Rights*. *Private Persons* move in another sphere, and act by other Rules than *Sovereign Powers*; the regard of Credit with them, may oftentimes yield to those

such an account legally tolerated. *In omnibus rebus vetustas ipsa plurimum habet dignitatis: Ita ut Massalienses quorum vastantissima creditur fuisse Respublica. laudentur eo nomine quod gladio aut pueris: sicuti ut sunt ad eam condita Urbe, quo indicarent in minis quoque rebus antiqua consuetudinis momenta preunda. Proximè enim ad Deum accedat Antiquitas, aternitatis quidam imaginis.* Grot. de Antiq. Rep. Batav. in Prefat.

It is no policy to attempt the change of Old Customes and Usages, even Errors and Abuses are upon

of *Utility*, or other motives; the *Publicke* receives little injury thereby, nor is their *Wisdom* questioned for such *punctilio's*, if they relin-

Speech to the  
Parliament,  
1674.

*Ceteris mortali-  
bus in eo stare  
consilia, quod sibi  
conducere pa-  
rent: Principum  
diversam esse for-  
tem quibus pra-  
cipua rerum ad  
summam divi-  
genda. Tacitus*

*Annal. l. 4. Si fama tua videtur necessaria. rectam munera sui administrationem non potest con-  
donare. Lellius de Inst. l. 2 c. 11. dub. 24. §. 26.*

relinquish them for other emoluments or Peace sake; but Sovereigns cannot so transact; their Subjects the People participate in their Honour and Indignities; they have a Property, a direct *Right* in the former †: Sovereigns cannot alienate or suffer their Honours to be impaired, because it is really theirs, it appertains to the Nation universally, and they are all effectually injured by such transactions, either because the indignity doth really extend to them, or because the Government and Authority is thereupon weakened and prejudiced, which is the greatest of Civil detriments that can befall a People, though ordinarily they are not aware thereof.

As Prudence doth thus distinguish betwixt the demeanor of Private and Publick Persons, so doth Charity it self; for though the Gospel precepts do oblige particular Persons to bear injuries and contumelies with patience, and to surrender even the Coat as well as the Cloak; yet is not this so to be construed, as if even Private Christians were to yield up their Civil Rights to every insolent that would in-  
croach upon, and usurp them, or that they were to deprive themselves of those Reparations, which the Law and Government affords them; neither is it so to be understood as if the Civil Magistracy in Christendom might not secure himself of that obedience and reverence, which is due unto Dignity, but bear the Sword in vain.

XIII. This being the value which this Nation did alwayes place upon the Right of the Flag, the which they never did regard only as a Civilty and Respect, but as a principal Testimony of the unquestionable Right of this Nation to the Dominion and Superiority of the adjacent Seas, acknowledged generally by all the Neighbour States and Princes of Europe, and must be pay'd and acknowledged by all Princes in the World, that shall be or pals on the same.

The Maritime Dominion by the Laws of England were alwayes accounted the Four Seas, such as are born thereon, are not Aliens, and to be within them is to be within the Legence of the King and Realm of England.

The Records in the dayes of Edward the 3<sup>d</sup>, and Henry the 5<sup>th</sup> proclaim it, that those Kings and their Progenitors had ever been Lords of the Seas; and amongst those many great Instances of proving the Sovereignty of the same, is that famous Record of Edward the first, and Philip the Fair of France, in which the Procurators of most Nations Bordering upon the Sea throughout Europe, as the Genoese, Catalonians, Almaines, Zelanders, Hollanders, Frieslanders,

*Selden Mare  
Clausum l. 2 cap.*

*24. Eius. herberti  
Protest. tit. 46.*

*Seld. ibidem  
cap. 23.*

*Co. 4. Insti. fol.  
142.*



ders, Danes and Norwegians, besides others under the Dominion of the Roman German Empire, do all joyntly declare, That the Kings of England, by Right of the said Kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable possession of the Sovereign Lordship of the Seas of England, and of the Isles within the same, with power of making and establishing Laws, Statutes and Prohibitions of Arms, and of Ships otherwise furnished than Merchant Men use to be, and of taking surety, and affording safe-guard in all Cases where need shall require, and of ordering all things necessary for the maintaining of Peace, Right and Equity among all manner of People, as well of other Dominions, as their own passing through the said Seas, and the Sovereign Guard thereof.

Vide part of the  
Record in fol.  
54.

By which it plainly appears, That the King of England had then been in peaceable possession of the said Dominion by immemorial prescription, that the Sovereignty belongeth unto them, not because they were *Domini utriusque ripa*, when they had both England and Normandy, and were Lords of both shores; (for Edward the first at that time had not Normandy) but that it is inseparably appendant and annexed to the Kingdom of England, our Kings being *Superiour Lords of the said Seas*, by reason (as the very Record mentions) of the said Kingdom, and since that the Sovereignty of the Sea did always appertain unto the English King, not in any other Right than that of the Kingdom of England; no Prince or Republique ought or can doubt the Title by which our present Claim is deduced; 'tis in that Right of *Britannia*, that the same is challenged, 'twas in that Right the Romans held it: the Claim justified Ed. 3. and his Rose Noble; though there are other reasons regarding to the *Lancastrian Line*, and Land make distinct Territories, and by the Laws of England the Land is called the Realm, but the Sea the Dominion; and as the loss of one Province doth not infer that the Prince must resign up the rest; so the loss of the Land Territory doth not by concomitancy argue the loss of the adjacent Seas. It is no more necessary that every Sea Town should command one hundred miles at Sea, than that each City should command one hundred miles by Land, *Julius Paucius de Dom. maris Adriatici*. which yield a Colour for the use of the *Port-cullis* in the Royal Banners of England; yet as in reference to the Maritime Dominion Henry 8<sup>th</sup> did embellish his Navy Royal therewith, and Queen Elizabeth stamped it upon those Dollars which she designed for the East India Trade, signifying her Power of shutting up the Seas, if she thought fit (as by a *Port-cullis*) with the Navy Royal; this Dominion of the British Seas did Authenticate the Proclamation of King James, ordaining the Flemish at Lond. and Edenborough to take Licence to Fish, this justified the like Proclamation by the late Royal Marryr King Charles, and warranted by the Earl of Northumberland in his Naval Expedition.

And the Case  
29 Eliz. in B.R.  
Sir John Constables, Leonard 3.  
part 72, the reason of the Opinion there is mistaken: for the right unto the Sea ariseth not from the possession of the shores; for the Sea and Land make

Anno Domini  
1600.

Anno Domini  
1609.

Anno Domini  
1636.

*Will. Fulbeck's*  
*Pandects of the*  
*Law of Nati-*  
*ons, c. 4.*

The King a-  
gainst Sir John  
Byron, *Bridg-*  
*man*, fo. 23, 24  
25.

That *Prescription* is valid against the *Claims* of Sovereign Princes cannot be deny'd by any who regard the *Holy Scripture*, *reason*, the *practice* and *tranquillity* of the *World*: and that true it is, the modern *Dutch* have pretended, if not dared, to challenge the Freedom to Fish in the *British Seas*, by *Prescription*; but it is likewise as true that *Prescription* depends not upon the *Corporeal* but the *Civil* possession, and that is retained if *Claim* be but made so often as to *barr* the *Prescription*, the which hath been alwayes made evident; first by frequent *Medals*, next by punishing those that refused it as *Rebels*, by guarding of it; and lastly by giving *Laws* time out of mind on it, which evidently proves that the *Civil* possession is not relinquished; and our *Kings* constantly claiming the *Dominion* of the same, none else pretending, all *Nations* acknowledging it to be in them, and the same never questioned, till those modern *Dutch* (of yesterday) arose.

XIV. The importance of the *Dominion* of the *Sea* unto this *Nation*, is very great, for alone on that depends our *Security*, our *Wealth*, our *Glory*; from hence it is that *England* hath a *Right* to all those advantages and emoluments, which the *Venetian* *Republicque* draws from the *Adriatique Sea*, where the *Ships* of the *Grand Seigneur*, of the *Emperour*, *King of Spain*, and *Pope*, pay *Customs*, to maintain those *Fleets*, which give *Laws* to them within the *Gulfe*; 'tis hereby that the *English* can shut up or open these *Seas* for *Ships* or *Fleets* to pass or repass them; whereto Queen *Elizabeth* had so special a regard, that when the *King of Denmark* and the *Hanſaticque* *Towns* solicited Her Majesty to permit them free passage, they transporting *Corn* into *Spain*, she refused them; and when a *Protestant Fleet* of *Hamburgers* and others, had presumed to do so notwithstanding her prohibition, she caused her *Navy Royal* to seize, take, burn and spoil them, when they were passed her *Maritime* *Territory*, within sight of *Lisbon*; yielding this reason for her *Justification*, that they not only relieved her *Enemy* with *Provisions*, but had presumptuously made use of her *Seas*, without obtaining her *Royal* *Permission* for so doing: 'Tis from hence that the *Crown* of *England* can justly demand an account of any *Ship* or *Ships* occurring in those *Seas*, what's their *Business*, and what their intentions are; and prohibit any *Prince* or *Republicque*, to enter there with patent *Fleet*, without preacquainting his Majesty, and obtaining his *Royal* *Permission*; without which *Dominion* and *Sovereignty*, *England* can never live secure on shore, it being easie for any *Foreign* *Fleets* to amuse us with specious pretences, and in their passage to invade and surprize us: Thus whilst the *Turk* pretended to sail for

*Malta*,

*Vide postea in*  
*Chap. of Customs.*

*June 30. anno*  
*1598.*

*Malta*, he occasionally possessed himself of *Canea*, in the Isle of *Candia*; many such presidents do occur in History: And in fear of such surprizal, the *Athenians* (being Lords at Sea) did exclude the *Persian* Monarchs from sending any Ships of War into any part of the *Aegean* Sea, *Rhodian*, *Carpasian* and *Lydian* Seas, and that which tends to the *West*, towards *Athens*; the like caution was used by the *Romans* against *Antiochus* and the *Carthaginians*; and the *Turk* prohibits all Nations, saving his Vassals, to enter the *Black Sea*, or *Pontus Euxinus*, and also the *Red Sea*; and that 'tis by virtue and force of this Right that the *British Nation* can drive on their own Commerce, navigate themselves, and permit others securely to Trade with them: 'Tis true that the *Dutch* have presumed some years since, to Violate the Security of the *British Seas*, by the attacking the Allies of *England*, not only within the *British Seas*, but in her Harbours, attempting to pursue a *French* Vessel up almost to *London*; and have more than once \* attacked the *Spanish* Fleets in her Ports, under the protection of her Castles, and that against the *Laws of Nations*, and the *Peace of Ports*, in which for the time they seemed to cloud the *Honour of the Nation*, but satisfaction for Indignities of that nature, though slow, yet are sure, and should such as those have been longer tolerated, Beloved *Britannia* must become a prostitute, by a Confederation of those *States*, or take *Pass-ports* for their Commerce; But the *Royal Martyr's* goodness was no longer to be trod on, His Heart and his Cause were good, and though those unhappy times (which were crooked to whatsoever seem'd straight) did hinder the accomplishment of his entire intention for satisfaction; yet those whom the Just God of *Heaven* was pleased for a time to permit as a punishment to this Nation to Rule, did not want in the fulfilling; for so soon as he was pleased to stay the fury of the *Intestine Sword*, their hearts took fire from that flame that had formerly been kindled in that *Royal Breast*, and having prepared a Fleet, in order to the treating as Souldiers with Swords in their hands, they were in the like manner assaulted in their Territories in the *Downes*; (but the *Dutch* found then what it was (though two for one) to assault a *British Lion* at the mouth of his *Den*,) intending, if possible, to have destroyed the *English Power*, but were frustrated in their design, being severely beaten home to their own doors; and afterwards those that then had got the *English Sword* in their hands, begun to consider that the *Victory* must be pursued, as a season fit to assert their *Ancient Right and Sovereignty* of the Sea, and then those People thinking that the odds before was not enough to destroy the *British Fleet*, they

*Selden lib. 1. cap. 11.*

*Alber. Gentil. Hist. Advocat. l. 1. c. 14. Vide Mr Secretary Cookes Letter to Sir William Brouncker, April 16 1635.*

\* The fight of the *Dutch* with the *Spanish* Fleet, in the *Downes* 1639. Scilicet hoc factum Hollandarum est contra justitiam omnem pro certo: & contra reverentiam qua partibus & territorii debetur alienis. *Alb. Gent. Hist. Advocat. l. 1. c. 14.*

Anno Domini 1552.

June 28 and 3d

About the 8th  
of Aug. 1653.

† Offered to  
Queen Eliz.  
Cetty-ey entre  
autres merite  
bien une consi-  
deration speci-  
ale. Que la con-  
junctioe desdits

Pays de Hollande, Zelanda, Frize, & des Villes de l'Escluz. & Ostende in Flanders, avec les  
Royumes de vostre Majesté, emporte & soit l'Empire de la Grande Mer Oceane; & par consequant  
une assurance & Felicité perpetuelle pour les Subjects de vostre Serenissime Majesté. John Stow  
Supplement to Hollingshed. Anno Dom. 1585. Vide Sir Walter Raleigh, lib. 5. cap. 2. §. 2. and 3.

equipt out a Fleet greater and far more numerous than the *English*,  
under the *Admirals Van Trump, De Witt*, the two *Eversons*, and  
*Ruyter*; but they suffered the same Fate as their former, about  
some thirty four of their Ships on the Coast of *Flanders*, burnt and  
taken, and the rest chased home to their Ports; and not long after  
followed the total defeat of their *Naval Forces*, accompanied with  
the death of *Van Trump* by the *English*, under the *Admirals Blake*  
and *Monk*, who had sunk and fired about thirty more of their Ships  
of War (no quarter being given till the end of the Battell) six *Captains*,  
and about a thousand *Men* were taken prisoners, and about six thou-  
sand slain. Of their *Presumptions* since (amongst other things) in de-  
nying the Duty of the *Flagg*, and of what punishment and check  
they have had for the same, to what condition they have been redu-  
ced and made to acknowledge that *Dominion and Superiority* to that  
Crown (under which their *Ancestors* humbly † besought the accep-  
tance of the *Soveraignty* of the *Netherlands*, might be annexed and  
protected) is now fresh in our memories: so high and of so great Im-  
portance is this *Dominion and Soveraignty* signified by the *Duty of*  
the *Flagg* in the *British* circumjacent *Sea*.

# CHAP. VI.

## Of the Right of Pressing or Seizing of Ships or Mariners, for Service Publique.

- I. That such Right is excepted in the Law of Dominion.
- II. Whether the Ships of Nations who are in War at the same time may be pressed, the danger being equal.
- III. Whether this Right extends to Ships to fight, and no more, or gives a power to Trade.
- IV. By the Laws of Eng<sup>d</sup> and the King may seize.
- V. The reason why such Power was used in the Admiral.
- VI. That such a Right of compelling Men to serve in Naval Expeditions may be.
- VII. Objections legal refused.
- VIII. Of the Ancient punishment of such deserters of the Kings service.
- IX. Whether it be lawful for a private Man to excuse Justice on such as fly and desert the service.
- X. Where a General Commission is given to Men to execute Justice.

I. **T**HE *Civil Law*, though it can command nothing which the *Law of Nature* forbids, nor forbid what it commands; nevertheless it may circumscribe Natural Liberty, and prohibit what was naturally lawful: and also by its force *antever*s that very Dominion, which is naturally to be acquired: Hence it is, that Princes by the Law of Nations may acquire a Right of use, of things that do belong to private Persons, for Property hath not (as hath been said) swallow'd up all that *Right*, which rose from the Common State of things; for as all Laws are to be construed as near as possible to the intention of the Makers, so we must consider what was the mind of those that first introduced singular Dominions; now the Role to construe that, must be as near as possible to Natural Equity, and that in extrem necessity that old Right of using things should revive as if the things had remained common, the same standing with the interest of all Humane Constitutions; and therefore in the Law of Dominion extrem necessity seems excepted: Hence it is, that the Vessels and Ships of what Nature or Nation soever \* that shall be found riding in the Port or Havens of any Prince or State, may be seized on, and employ'd upon any service of that Sovereign that shall seize, the same being but a harmless utility not divesting the Owners of their interest or property.

II. If a Ship of the King of *Denmark* be in the Port of *London*, and the *Swede* is in War with that Prince; and it happens at that time the King of *Britain* is in War with the *Spaniard*, now the Possessor is here pressed with an equal necessity, and by the same argument is rather obliged to the defence of his own Country than

Eana, aut ma-  
lo aut necessario  
facinore vivente.  
Livy lib. 24.

\* F. de Navi-  
bus non excus.  
C. l. 11. tit. 3.  
and Petrus on  
the same Law.



*Quidni enim  
(inquit Cicero)  
quando suo de-  
trimento suo po-  
test, alteri com-  
municet, in iis  
qua sunt accipi-  
enti utilis, dan-  
ti non molesta.  
1 de Offic. 1.*

*\* De Expedi-  
tions Cyri.*

another, whether by the Law of Nations the Ship ought to be detain'd, hath been doubted; most certain they may: who would not pluck a Shipwrackt Man from his plank, or a wounded Man from his Horse, rather than suffer himself to perish? to slight which is a sin, and to preserve the highest of wisdom; besides in the taking of the Vessel the Right is not taken from the Owner, but only the use, which when the necessity is over, there is a condition of restoring annexed tacitly to such a seizure.

\* And doubtless the same right remains to seize the *Ships of War* of any Nations, as well as those of Private interest, the which may be employ'd as occasion shall be present: So the *Grecians* seized on Ships of all Nations that were in Ports, by the advice of *Xenophon*; but in the time provided food and wages to the Mariners.

10 Ed. m. 16. 12.

*\* 23 Ed. 1.  
Rot. 77. in the  
Exchequer.*

*12 E. 3. in the  
Black Book of the  
Admiralty  
p. 26 and 27.  
6. Job. m. 11.  
9. Job. m. 3. 24. Ed.  
2. m. 27. 11 R. 2.  
m. 13. Rot. Franc.*

III. Whether this Right extends so far as to give Princes a Power to seize in order to Traffique, may be some question; certainly if the Traffique be for such commodities as Masts, Timber, Tar, Powder, Shot, or other Commodities or Accoutrements of Armes, or Naval Provisions of Offence necessary for the Defence of the Realm, it may be done (but then it is just, *freight* \* should be pay'd) for what hurt can it do me to let another my Boat to pass over a Ford, if he rewards me? And if that be answered, the Owners are at no prejudice, for this is but a harmless utility.

I V. By the Lawes of *England* there is no question, but the King may seize, and it appears by very many Ancient Records, that he might do it; and it was one of the *Articles* of Enquiry amongst others, *Item, soit en quis de Jreiss qui sont arrestez pour le service du Roy ou de l'Admiral, & debzeissant le Arrest*, then follows, *Or donne estoit en temps du Roy Richard le premier a Grimes y per advise de plusieurs Seigneurs du Royaume, que quand Jreiss seront arrestez, &c.* and that upon such Arrest broken, the parties might be punished and fined.

*De Offic. Admi-  
ral. Anglia per  
Roughton Artic.  
10.*

Again, *Inquiratur si arrestatum, ad serviendum Regi fregit arrestum, huiusmodi transgressor stat in gratia Regia sive Admiralis sui utrum voluerint committere Carceribus mancipandum vel finem facere, in hac parte si arrestum huiusmodi factum manifestum fuerit cognitum.*

*The Black-  
Book of the Al-  
miralty. fol. 28,  
29. and 157.  
158.*

*15 R. 2. c. 3.*

If the *Admiral* by the Kings Command arrests any Ships for the Kings Service, and he or his Lieutenant return and certify the Arrest or a List of the Ships arrested, into *Chancery*, no Master or Owner of the Ships so arrested shall be received to plead against the return, *pur ceo que l'Admiral & son Lieutenant sont de Record.*

And if the Ship so arrested, break the arrest, and the Master or Owner

Owner thereof be indicted and convicted *deuant* P<sup>r</sup>amiral, by the Oath of twelve Men, the Ship shall be confiscate to the King, which power the General maintains in all places where he has power, and the same seems to be provided for in the latter Clause of 15 R. 1. Ca. 3.

*Cro Arg. of  
Hampdens Case  
called the Ship  
money C. fol 79  
to 100.*

King Ethelred his Bishops and Nobles in the General Council of *Engham* An. 1009, for the setting out a Fleet every year; and the punishment of those who hurt or Spoiled any Ship, or deserted the Service, especially if the King was present in the Expedition; amongst others it was Enacted, *Si quis Navem in Reipub. expeditionem designatam vitiaverit, damnum integrè restituit, & Pacem Regi violatam compensato; si verum ita prorsus corruperit, ut desinceps nibili habeatur, plenam huius injuriam & lesam præterea Majestatem,* so Sir Henry Spelman's Version out of the Saxon Copy renders it, but the Ancient Copy hath it more largely.

*Spelmanni Con-  
cil Tom. fol 510.  
521.*

*Naves per singulos Annos ob Patria defensionem & munitionem præparentur, postque Sacrosanctum Pascha cum cunctis utensilibus competentibus simul congregentur; quæ igitur etiam pœna digni sunt, qui Navium detrimentum in aliquibus perficiunt, notum esse cupimus. Quicumque aliquam ex Navibus per quampiam inertiam vel incuriam, vel negligentiam corruperit, & tamen recuperabilis sit; is Navis corruptelam vel fracturam ejusdem per solidam prius recuperet, Regique deinde, eaque pro ejusdem munitionis fractura, sibi meti pertinent, rite persolvat.*

*Spelmanni fol.  
528. expeditio  
Navalis.*

Most certain it is, that the Kings of England, have in all Ages by their *Writs* and *Patents*, commanded not only the *Admiral*, but the *Wardens of the Cinque-Ports* and others, to arrest and provide Ships of War and other Vessels, and impress and provide Masters of Ships, Sea-men, Mariners, and all other necessary Tackle, Armes and Provisions for Ships, for the defence of the Sea and the Realm against forreign Enemies, or for transporting of Armies paying their freight (if not bound there by tenure) as well as to elect and provide all sorts of Souldiers, Carpenters, and other Officers to be assistants in their several Expeditions.

*Rat. Scoria 10  
E. 3. m. 2. to 17.  
and then to 14.  
intrus & dor. to  
28.*

But Fishermen or Mariners pressed for the Service, are not to be imploy'd as Souldiers, but only as Mariners; unless it be in cases of great necessity, or bound thereunto, by Tenure, Custom or Covenant.

*1 Eliz. cap. 13.  
Vide Stat. 16 17.  
Car. 1. c. 15.*

And Water-men that shall withdraw themselves in time of pressing, shall suffer a fortnights imprisonment, and be prohibited to row on the *Thames*.

*2 and 3 P. & M.  
C. 16.*

V. The reason why the *Admirals* had such power given them, was, because they being sometimes called *Capitanei*, and *Gubernatores*

*tores Flotarum*; they had their ordering and Governing of the Ships of War, and the raising and fitting up such Ships for the Navies, as they thought fit; other times called *Custodes Maritimarum portuum* their duty being to provide all Naval Provisions, as well to supply the Kings Navies occasions, as to gratifie another of the Kings Friends when distres should constrain them to touch in his Ports, that his Subjects might receive the like retaliation: again, they were called *Capitanei Nautarum, & Marinellorum*; as in reference for the deciding all differences amongst those in the Kings Service, and punishing of such as transgressed; and as the place was great, so the Power was large, especially in all things belonging to the *Navy Royal*, in which they had the Supream Rule and Government in all things belonging to it. He sat formerly in the Kings House, and there kept his Court, as the *French Admirals* do at this day at the *Marble-Table*, in the Kings House at *Paris*.

It is lawful for every Man to addict and yield up himself to whom he pleaseth, as appears both out of the *Hebrew Law* and *Roman Law*; why then may not any people being at their own dispose, give up themselves to their Prince or Sovereign; so as to transfer the Right of commanding their Aid and Help, as often as need shall require (it is not here inquired what may be presumed in a doubtful Case, but what may be done in point of Right,) most certain such a Power may well be done, and that grounded on great Reason: First, if the Common-wealth should happen to be invaded by such a one as seeks not only the subversion of the Government but the destruction of the People, and they can find no other way to preserve themselves, but that the Supream Power should be vested with such a Prerogative, as to inforce or press the Inhabitants to serve in Armes in the defence of the same, and the contempt of which to punish, or if they should be oppress with want, and that supplies of Provisions can no wayes be had, but by compelling another by force to exhibite the common offices of humanity to a Nation in whose Territories a Famine rages, that the Inhabitants should on such extraordinary occasions be compelled by force to serve in Armes.

And this Dominion may be obtained several wayes, either by a voluntary resignation to a Conquerour, as they of *Capua* to the *Romans*, *Our Land, the Temples of our Gods, all Divine and Humane things, we yield up into your hands, O ye Conscript Fathers*: Again, Freedom may be granted to all by a Conquerour, except Mariners, which should in cases of necessity be excepted, or that some Prince, who will not suffer any Mariner to go out of his Dominions,

*Vid. Sir Henry Spelmans Gloſſ. in tit. Admir.*

*Lamberts Election tit. Admiral. fol. 42.*

*Exodus 21. 6. Inst. de lute perſon. §. ſervi autem. Gell. l. 2. c. 7.*

minions, without subjecting themselves to such a reasonable command, and the Majority Nations on such grounds, may abdicate from a part of them the entire Freedom of that member.

Nor are there Examples of this kind wanting; the *Germans* are every one Master of his own house, but are almost on every occasion subject to their *Lords*, especially in their Goods. The *Irish Corsheers*, which were reprehendinations when the *Chief Lord*, and his Retinue came to his Tenants House, and fed upon their Provisions till they were spent, all being solely at their devotion: And as to the Sea, the King of *Britain* may at this day restrain Merchants or Mariners to pass out of the Realm, without Licence; and the various tenures that are introduced, which is presumed were since the *Conquest*, were no other but the Will of the *Conquerour*, for the Right is not measured by the excellency of this or that form, but by the Will.

VII. And though it hath been conceived by some, that the King cannot press Men to serve in his Wars, giving their Reason, that of old he was to be served, either by those that held by Tenure, those that covenanted by Indenture to provide Men, or those who contracted with the Kings Officers for wages, and entered into pay, or those that were in Prison for the Kings debts; but that only extended to those Wars that were by Land: Not one word in all those Acts, or Mr *Rolls*, that any wayes mention the least of Mariners; and yet what vast Fleets were in those dayes: but on the other hand, it hath been alwayes accustomed to press such sort of Men for the Naval Expeditions. The Ancient Records that mention such Persons subject to press by Law, is that of 49 E. 3. commonly called † *The Inquisition of Queenborough*, wherein it was expressly in charge amongst others, to inquire of those Mariners that were pressed for the Kings Service, and deserted the same: So likewise by those other *Articles* Translated by *Roughston*, it is express in Charge to the *Jury*, to present those that being prest to serve, brake the Kings Arrest, in order to their punishment; and in those dayes it was esteem'd an high offence: And the Oath which the *Jury* then took being impanelled, was this:

This here see My Lord the Admiral, that I Jonathan Nash Hall well and truly enquire for our Lord the King, and well and truly at this time then serve at this Court of th' Admiralty; present at moch, as I have acknowledge, or may have by information of any of my fellows; of all mane Articles or Circumstances that touchen

H

the

Tatius.

Co. 3. Instit. fol. 358.

2 E. 1 Memb. 18.  
Rot. Par. 2 E. 1.  
m. 17. Ro. fin. 31.  
E. 1. num. 44. Ro.  
Par. 17 H. 6. Ro.  
Clauſ. in dorſ.  
Vide the Case of  
Bates in *Lanes*  
Reports. fol. 4.Co. 6. Part. Case  
of Souldier. Vide  
the first Institu-  
tes fol. 71.

And the Stat. which provides punishment for those Watermen, Which shall hide themselves, does evidence what the Common Law was as to the Right of Pressing, which certainly would never punish those whom they could not press.

† 2. Aprilis  
49 E. 3. in the  
Black-Book of  
the Admiralty

33. 33. 34. *Art.*  
and *fol. 6. Art.*  
10.

The Black-  
Book of the  
*Admir.* fol. 17.

*Iam* b. inter  
*Leg. Edvardi* f.  
139. 13 *Car. 2.*  
*cap. 9.*

† Non solum du-  
cibus aliisque po-  
tentibus immasci-  
joles, atque im-  
morari bene a-  
gendiproposuit,  
sed cuique volun-  
ti & licet & ho-  
nestum est ejus  
quo viris Repu-  
blica malis com-  
moveri, & publi-  
cas utilitates pro  
suis viribus pro-  
movere. *Vide Gro-  
tium* l. 2. c. 20.

† That is as to  
entitle him to *Clergy*, and so it was ruled by all the Judges in *B. R. M.* 23 *Car. 2.* in the Case of  
one — found specially at *Surrey Assizes* before *Mr Justice Twisden*, who slew the Adulterer in  
the very act. *Vide August. Cimis. Dei citatum. C. quicunque, causa* 23, qu. 8.

*An. 25 Eliz. Co.*  
*Lin.* fol. 74.

*Code Justin. tit.*  
quando licet  
amicumque.

the Court of the Admirate and Law of the Sea, the which shall be grate to me at this time; and I thereupon sworne or charged, and of all other that may renew in my minde, and in shall for nothing lette, that is for to say, for Franchise, Lordship, Rinteden, Alliance, Friendship, Love, Hatred, Envy, Enemities, so dyed of lost of Goodnee, for none other case that I shall see doe, the Kings Counsells, my fellows, mine owne, will and truly be- le what oute fraude or malengyr, so God me help at the holydo- me, and by this Book.

VIII. And as the enquiry was strict, so was the punishment very great: *Item, qui fugiet à Domino vel Socio suo pro timidine belli, vel mortis in conductione Heretochii sui in expeditione navali vel terrestri, perdat omnia quod suum est, & suam ipsius vitam, manus mittat Dominus ad terram quam ei ante a dederat.*

IX. If such Persons shall so desert the service, it hath been a question whether a private person under the same obedience meeting with such a deserter, might not put him to death; it hath been conceived that he might, and the Act is lawful, and the party that slayes him hath a true Right before God, as impunity before Men: But that is to be understood partly by the words; and partly by the Letter of the Law; for if the Law gives indulgence to passion, it takes away humane punishment, and not the fault: As in case a Husband kills an Adulterous Wife, or the Adulterer † in the act, most certain it is a provocation in the highest nature, and will justify the slayer: But if the Law respect the danger of future Evil, by delay of punishment, it is conceived to grant Right and publique Power to a private Man; so that he is not then in the capacity of a private Man.

And upon that very reason *Queen Elizabeth* deny'd the Constituting of a Constable, for the Trial of *Sir Francis Drake*, who struck off the Head of *Doughty*, in partibus transmarinis.

X. Hence it is, that every man hath a Licence given him to oppose Force against plundering and pillaging Souldiers, and the next the subsequent Law about Deserters saith, *Let all Men know they have a power given them against publique Robbers and Deserters that run from their Colours, and all are Ministers of revenge for the quiet of all; to this purpose is that of Tertullian, Against Traytors or Publique Enemies, every Man is a Souldier*, and herein differs the right of killing of Exiles and Outlaws, or those whom they call

*Banno.*



*Banishments*, from those kind of Laws, because there proceeds a special Sentence, the Judgement of Banishment or Outlawry being promulgated; but here a general Edict, the Fact being evident, obtains the force of a Judgement or Sentence pronounced; the Judgement of the latter must be according to the Civil Law, which yet remains still in force, as to the Tryal of such deserters, by which impunity for such killing seems allow'd of at this day by that Law.

It was in force in England till the beginning of the Reign of Edw. the third time. *Co. Instit.* 128. B. 13 H. 4. fol. 45. 37 H. 6. fol. 3.

## C H A P. VII.

## Of Dominion established by Treaties of Alliance equal.

- I. Of Treaties by interview of Princes, and where generally held.
- II. Of Princes equal, the honour pay'd by him in possession to him that comes to the Treaty.
- III. Of Treaties by Princes unequal.
- IV. Princes where obliged to treat personally, and where not.
- V. Deputies their demeanor considered generally at Treaties.
- VI. Of the nature of Treaties generally, and their ends; and where they determine by the death or dispossession of a Prince, and where not.
- VII. Of Treaties in reference to matters particular, and of the nature of Leagues Offensive, and to what end.
- VIII. Of the causes ordinary procuring such Leagues.
- IX. Of Leagues tending to the procuring of personal Peace and Warranty.
- X. Of Leagues Defensive, and of their end; together with considerations on the Persons with whom they are made.
- XI. Of accidents not provided for in the League how far in honour to be comply'd with.
- XII. Of Contribution, the difficulty in regulating the same to the satisfaction of the parties interested.
- XIII. Of Leagues concluded by Deputies, and of the Ratifying the same.
- XIV. Of the causes extraordinary that tend to the breach of Leagues.
- XV. Of the causes ordinary that give occasion for rupture of the same, and from whence they proceed.
- XVI. Of the Obligations on Confederates as in reference to mutual succours.
- XVII. Of Aide granted to particulars, and Common Allies, when invaded by another Ally; and of protection granted when a People are oppressed whether Aide to such may stand with the League.
- XVIII. Whether the Oath taken for the performance of such a League is personal, or binds the Successour, and the general Rule in construing of the same.
- XIX. Of Leagues made with Princes though driven out of their Country when the same are good.

I. Treaties are acted either by the interview of Princes, or by Persons sufficiently Commissionate for that purpose.

Those that are by interview, have been often disapproved, though often practised; but that depends rather of the Estate of affairs, and the conformity and diversity of Honours, and manner of living of the Princes and their People, than of the interview: that of *Lewis*

*Jugurtha* taken by his Father in Law

*Bacchus*, &c. delivered to the Romans; *Charles* the 7th of France, at a personal Treaty with Duke of Orleans, slew the Duke, though a Sovereign Prince. *Meyer l. 15.*

Places Neuter belonging \* to some Common Friend, or some Frontier or Islands, are generally appointed for the same, together with what numbers or forces they are to be accompanied.

I I. But if of two Princes, the one goes home unto the other, he is bound to do him the honour of his House.

*Phil. Comines lib. 4. c. 9. 10.*

\* As that between Edward the 4th and Lewis the 11th in the Territories of the Duke of Burgundy.

*Vide Emilium Paulum* in the History of France; and Ferron his supply of the same of the Life of the Duke of Orleans, afterwards Lewis 12th upon the failure of Issue Male of Charles the 8th.

In the interview that was between Lewis the 12th and Ferdinand of Arragon at Savona; (which then belonged unto the French King) Lewis the 12th, at the approach of Ferdinand's Gally (before he could land) entered into it, accompanied only with his Guard, to testify his confidence, and thereby to assure King Ferdinand of that which he had promised he should find in him; and at their going to Land, King Lewis left the Right hand to Ferdinand, who lodged in the Castle, as the most Honourable place, and himself went to the Bishoprick.

III. By the Laws of Treaties, when two Princes unequal in Quality partly, the inferior is to come first to the place of congress there, to attend the Greater.

IV. Ambassadors having received Orders to Treat the Prince to whom such are sent, are not by the Lawes of Treaties bound to treat personally, but only to depute some of his Council for that effect; the reason is, for that the dignity of a Prince may receive some detriment, which cannot be maintained amidst the contestations which happen in Conferences.

But if an Ambassadors be deputed as Lieutenant to a Prince, there indeed such Commissioner is not bound to treat, but only with the Prince himself: and so it was where the Bishop of Gurgis, who was deputed by the Emperour to Pope Julius the Second; the Pope Commissioned three Cardinals to treat with him, but the Bishop having notice in what quality he was like to be received, Commissioned three Gentlemen to Confer with them, excusing himself upon other affairs, which afterwards was explained, that he came not as a single Ambassador, but as a Lieutenant to the Emperour, to the which Quality he had been received at Rome by the Pope.

V. The

*Julius Ferronius de legatis Principum. & de eorum fide & officio.*

V. The *Deputies* being assembled, their Seats are considerable, they having no Power to quit any thing of the Rank, which their *Masters* ought to hold, and by the Lawes of Treaties, the first place is at the head or end of the *Table*, (if there be one) the second is the first on the right hand, and the third is, the first on the left hand of him that is at the end: and if there be many *Deputies* to one Prince, they usually sit at one side, to have the more facility to confer together, if it be needfull.

VI. Treaties which are made with our Neighbours as Friends, are called *Treaties of Alliances*, *Equal* or *Unequal*: The *Equal* is either of single Friendship only, for the entertainment of Traffique, or for Aid and Succour; that of Succour is for the *Defensive* or *Offensive*, and sometimes for both, with or against all Men, or against some certain Princes and Republicques, and there † *Alliances* are contracted, either from *Estate* to *Estate*, and for the preservation of the *Estates* of each other (in which case by the death of the Prince they may not be interrupted;) or else they are contracted betwixt *Prince* and *Prince*, and then the death of one suspends till a new Treaty hath confirmed it, unless there is a time certain prescribed by the Treaty, to the which the Alliance must continue after the death of the *Prince*; or else they are made from an *Estate* and *Prince*, where the death of the Prince does likewise, if not dissolve, yet at least suspend till a new Treaty of Confirmation of the precedents, although by the Laws of *England* *Res non intermititur*.

† The Leagues between the Crown of France and Spain, are commonly between Kings and Kings, Realm and Realm, and Man and Man of their Subjects, and hath in time past been looked upon to be the firmest of Alliances. Phil.

Comines lib. 2. cap. 8. p. E. 4. 2. 4 The League then made with the Scots, and likewise between Ed. 4th. and the Duke of Burgundy. Phil. Comin. lib. 3. cap. 6.

VII. Sometimes *Alliances* are contracted for an Enterprize, and for one effect only, in the part which the Allies are interested, and such is generally called *League*; which in *England* have been sometimes confirmed by Act of Parliament. \*

Leagues commonly are *Offensive*, but in effect they tend to attempt against some one, and in the bottom are lodged *Articles of secrecie for the Enterprize*; and such was that of *Cambrey* against the *Venitians*, in which they borrowed the pretext of Religion, and the Peace of Christendom.

\* Rot. Pat. 4 H. 5. num. 4. Coke 4. Inst. 156. Treaty of Cambrey, the Confederates of which were Pope Julius the second,

the Emperor, King of France, Spain and Arragon. Anno 1558. Vide History of the Republicke of Venice. fol. 87.

VIII. The ordinary Causes for which *Princes* and *Republicques* make Leagues, are either to facilitate a Conquest, as that that was made between *Levin* the 12th, and *Ferdinand* of *Arragon*, for the Realm of *Naples*.

Or to ballance the Forces of one that is more Mighty, in hinder-  
ing him that he grow not greater: but Armes ought not to be ta-  
ken, to diminish such a Neighbours Power, for that fear is uncer-  
tain, but prudent Leagues may be made in diminishing their Power.

The *English* made a League to succour the *Hollanders*, not only  
to ballance the growing opulency of the *Spanish* Monarchy, but li-  
kewise to encrease her own by the Alliance of the *Dutch*. *Quid se-*  
*quitur?*

Again, Leagues may be made for the procuring of a General Pea-  
ce, by way of *Mediation* of their Neighbours in War; and such  
was that League of Union propounded by His now Sacred Majesty,  
and afterwards concluded betwixt him and the *States General* of the  
*United Provinces* for an efficacious Mediation of Peace between  
*France* and *Spain*, (His Sacred Majesty of *Britain* having a prospect  
to what afterwards happened, and of a War wherein most inevita-  
bly the same must involve the most of the Princes in *Christen-*  
*dom* to the effecting of which Peace, His Majesty and the *States*  
*General*, did obtain a promise from the *French* King to the *Dutch*,  
to lay down Arms, on condition the *Spaniards* would formally and  
solemnly by a Treaty of Peace, quit to him all those Places and Forts,  
together with the Chastellenies, and their appurtenances which they  
by force of Armes had taken in, or fortified in the then last years Ex-  
pedition; or otherwise, that the *Spaniard* be brought to transferr  
to the *French* all their remainder in the Dutchy of *Luxemburg*, (or  
in the County of *Burgundy* together with *Cambray* and *Cambresis*,  
*Douay*, *Ayre*, *S' Omers*, *Bergue*, *S. Avinox*, *Fuernes* and *Lynd*, with  
the Bailywicks, Chastellenies, and all other their Dependencies,  
and the *French* King to restore to the *Spaniard* all Places, Territories,  
which they have by Armes taken since their entrance into *Elanders*,  
on condition that the *States General* do reciprocally undertake and  
secure to the *French*, to prevail with the *Spaniard* to consent to the  
same Conditions, which once effected would (as was hop't) initiate  
the tranquillity of, and interest not only of two Warring Crowns,  
but of all other the Princes of *Christendom*. To the effecting of  
which, there were several Articles agreed, and likewise it was agreed,  
That if a Peace should happen to be made, His Majesty and the *Sta-*  
*tes General* should become Warrantees, and a Place left for any  
other Prince or State to come into the same; and who should think  
it their interest to keep the Peace of *Christendom* undisturbed; and  
to restore the *Low-Countries* to their Tranquillity, there was pro-  
vision made likewise by the same, for the Forces of each of the War-  
rantees to be used against those that should break and violate the  
same,

*Sic ut vim pati  
posse ad vim infir-  
mendam ius tri-  
buat ab omni  
aquitate abhor-  
ret. Grotius de  
Iure belli & pa-  
ci, lib. 2. cap. 15.  
§. 17.*

League of U-  
nion between  
His Majesty of  
*Britain* conclu-  
ded at the Ha-  
gue, with the  
*States General*  
of the United  
Netherlands  
January 11 Anno  
1668.

same, obliging them to cease the violence, and repair the party injured.

IX. A *Defensive League*, which hath no other benefit but a necessary Defence, and in the which Mean Estates are in a manner equally interested, last usually longer than an *Offensive League*, which is voluntary, and from the which either of the *Confederates* will easily part when he hath more interest; So as in *balancing* the interest of the one and the other, he that shall find himself accompanied with distrust, and an opinion to be irreconcilable to the Common Enemy, generally proves the most firm in the League.

The *Wisdom, Courage, Means and Constancy* of the Prince or State is to be considered; so likewise of the *distance* of the *Places*, as well in regard of those with whom they unite, as of those against whom they make the Leagues.

Leagues having no other limitation, *but the end of the Enterprize* for which they were made, have admitted many large debates in Cases of Accident: For instance, if an Enemy shall take the Countrey, for the Defence whereof the League was made, the Question has been whether the *Confederates* be bound to assist him, who hath lost it in the Recovery; some have held, that the *Defensive* did not extend so far: notwithstanding if there were no Treaty, which had concerned this Conquest, yet it would seem more reasonable to comprehend the Recovery in the Defensive, if it be general. For as it hath for its end to preserve the *Allie in his State*, and that to attain unto it, the Forces must not only remain in the Countrey of the *Allie* to attend the Enemy, but after denunciation and other acts of hostility done by the Enemy, they must enter into his Countrey, to the end to prevent him or divert him from attempting any thing against the *Allie*: The *Offensive* being judged by the *aggression*, and not by *that which follows*; by a stronger reason they ought to enter into the Countrey conquered from the *Allie*, for the recovery thereof; but excuses in this kind proceed from those, who fail in their faith, courage or means to recover.

O Roman! what to the League? what to the Gods, the Judges of the League? whom shall I bring unto thee to be the Judge of thy anger, and of my punishment? I refuse no People, nor private Men.

*Contribution* is one of the main Ingredients in a *League*, and is of difficulty to regulate. It is made either in *Men or Money*; the Men are entertained by all Parties, or by him only that hath need, or otherwise as the League is. Henry the 8th † made a League with Francis the French King against the Marriage.

Empe-

But a Defensive War is unjust on his part who gave just cause of War.

Pontius Sannius after restitution made to the Romans, and the author of the breach yielded up expiatum (saith he) quicquid ex fœderis rupto irarum in nos celestium fuit. Satis scio quibuscumque diu cordi fuit subigi nos ad necessitatem cadendi res, in non fuisse cordi tam superbi à Romanis fœderis expiationem ferream: And a little after, What more do I owe to thee,

† Anno 1515. Vide Sir Rob. Cotton Remonstr. of the Treaties of Amity and



An. 1515. vid.  
Sir Robert Cot-  
ton Remonstr. of  
Treaties.

Emperour *Maximilian* and *Ferdinand*, for the Recovery of *Milane*, which he did, the Protection of his Neighbours, and Reduction of the *Swisse* from the *Imperial* side; for which he employed the *Bastard of Savoy*, the agreement was of reciprocal Succour of ten thousand Men if the War were made by Land, and of six thousand if it were made by Sea; and in all other occasions the *French* King was bound to assist the King of *England* with twelve thousand *Launces*, and the King of *France* with ten thousand Foot, at his Charge that had need.

So where *Contribution* is concluded for Money, there are difficulties that do arise from the *Person* or *Place* where it must be kept, for to deliver it to the hand of the strongest, is not safe, for fear they shall not be able to call him to account, to lay it in a weak Place, were to oppose it to the attempt and force of the strongest, or to him that shall first take *Armes*; but it has been usual, the summe has been advanced, not till after the War begun.

Andrea Mauro-  
reni Hist. Ven.

XII. Leagues Concluded by the *Deputies* of the *Confederates*, there sometimes falls out a Difficulty who shall Ratifie and Declare himself first: In the League which was made between *France* the first, the *Pope*, and the *Princes of Italy*; the King refused to ratifie until the *Pope* and *Venerians* had ratif'd before him, and in that he so cunningly wrought, that he procured the *Colleagues* to declare and begin the War, whilst that he treated secretly for himself, to the end he might make his Conditions with more advantage; this he declared was for fear those *Italian Foxes* should shew him the like.

4 If one part hath violated the League, the other may depart from it; for the several Heads of the League have every one the force of a Condition; So *Grotius* conceives lib. 2. cap. 13. §. 15.

*Soluti foederis culpam sustinent, non qui deserti et alios se consueverunt, sed qui quam jurati promiserant opem ro-*

XIII. Leagues made for an Enterprize, succeed seldom according to the hope of the *Allies*, if the Enterprize be long; for besides the preparations be long, the Opinions divers in the pursuit, the resolutions inconstant, the interests of Princes or States in a League may change with time, or with the practice of him against whom they are in League, in withdrawing some one of them, or making him to suffer more loss than the rest, for seeing himself ill defended or succoured by his *Confederate*, and that he was in a greater danger to lose than his Companions; he then studies to retire † and to make his accord apart, as did the *Turks*, after the loss of *Cyprus*.

XIV. The ordinary causes of the Rupture of Leagues are distrust or jealousy, as if one hath had conference with the Enemy, without the consent of the rest; if that which serveth for the safety of one, diminish the safety of the other; inconstancy, variety, cowardize, division, usurpation, without the consent of the others.

So if he treats with the Enemy, not comprehending the other *Allies*, but as *Adherents*; as *Lewis* the 12th left the League of the

Ven-

*Venetians*, for that they had made a Truce with him, and had presumed to name him only as an *Adherent*: by the Opinion of *Bryan*, that if all the Subjects of *England* would make War with a *Confederate Prince* or *Republique* in League with the King of *England*, without the assent of the King of *England*, that such a War was no breach of the League; and upon the same reason was the resolution of the Judges in the Duke of *Norfolk's* Case, where the Question was, whether the Lord *Heriford*, and other Subjects of the King of *Scots*, that without his assent had wasted and burnt divers Towns in *England*, and proclaimed Enemies, were Enemies in Law, within the Statute of 25 E. 3. the League being between the *English* and *Scots*, and resolved they were, and that the League remain'd.

XV. The Succours that one *Confederate* must afford another *Confederate* (according to the *Laws of Leagues*) against *Confederate*, is of a great consequence: Three Princes Allied, the one makes War against the other, and demands succours from the third: In this Case, if the Treaties of Alliance be onely for *Friendship*, it is certain he is not bound to give any succours, But if the Treaty carries an *Offensive League*, he must succour the most ancient allied by a precedent alliance: If the precedent Alliances have been made both at one time, he must succour him that is Allied in all *Offensive* and *Defensive* Leagues: but if the League be *Offensive* and *Defensive* of either side, he ought not to succour either; but he may mediate a \*Peace, and cause the difference to be judged by the *Common Allies*, which being propounded with a Declaration that the refuser, or having once submitted will not yield to Judgment, that he will succour the other, as the *Swede* and *Swiss*, upon several occasions have done, notwithstanding in point of State in such occasions they usually ballance their Estate, and looking more to safety than Justice, they succour him who being enforced, may weaken the powerful, who is more to be feared; yet to unjust Wars there is no obligation, then certainly he ought to be preferred, who hath a just cause of War.

generaliter vel specialiter suorum requisitus, munum tibi sicut posero prestabo auxilium. Demosthenes Orat. de Megalopoli.

XVI. By the *Laws of Alliances* Princes may aid particular and *Common Allies*, if they be wronged by one of the *Allies*.

But he which is not comprehended in the Treaty of Alliance, cannot be defended against him that is Allied without breach of the Alliance; therefore Mediation in such cases is the only hopes of the oppressed, which not having its effect, if the oppressed but

non prestant. A libi apud eundem si vel tantillum ex diſſis pars alterius a tranſgrediarur, rupta fore pacta. Tacit. lib. 1.

19 E. 4. vide Stat. 2 H. 5. cap. 6.

Hill. 14 E. 12. in the Duke of Norfolk's Case. 4 Inst. fol. 152.

† in fidelitate feudali dicitur; Et si scivero vellet se aliquem juſſe offendere, generaliter vel ſpecialiter ſuorum requisitus, munum tibi sicut posero prestabo auxilium. Orat. Demosthenes, de Megalopoli.

\* Nihil intercedi, quo minus summi populo paci belique liberum arbitrium sit. Liv. lib. 8.

Grotius de Jure Belli ac Pacis lib. 2. c. 15. § 13. In fidelitate feudali dicitur: Et si scivero vellet se aliquem juſſe offendere, & vide

Equals cannot directly refuse War, nor demand Peace.

themselves into the protection of the *Mediator*, they then become in the nature of his Subjects, and then that *Prince* is obliged to their *succour* and *defence*, even against his *Allys*, and this is by Natural Right.

Liv. 3. Polybius  
in excerptis Le-  
gationum 35.

When *Edw.* the 4<sup>th</sup> was chaled out of the Kingdom, and *Henry* the 6<sup>th</sup> was set up again; yet by reason there was inserted into the same, these words; *Viz. With the King and Realm*, that the League did remain perpetual.

XV II. By the Lawes of Leagues, though the Oath binds only the *Person*, yet the *Promise binds the succession*; for though some do hold that Leagues do depend upon the Oath as their firmament, yet that is not so, for the most part of the *efficacy* of such Leagues rests in the *promise it self*, to which for *Religion sake* the Oath is added. Hence it is, that *Promises made to a Free People*, are in their nature *real*, because the subject is a *permanent matter*, although the State or Republique be changed into a *Monarchy*; yet the League remains, for that the *Body, i. e. the Power* is still the same, though the *Head* be changed. And the *Person* is inserted into

1. Phil. Comines lib. 3, cap. 9.

Ulpian. Leg. Aure.  
Gentium, sect. pa-  
ctum. D. pactu.

the agreement, not that the agreement may be personal, but to shew *with whom it is made*, for if it be infered into the League that it shall be *perpetual*, or that it is made for the *good of the Kingdom*, or with the Person and his Successors, or for a time limited, the same does most apparently demonstrate the thing to be real.

*Addo qua Hel-  
vetiis causantur  
post mortem Hen-  
rici 1. apud Thu-  
anum, l. 97. in  
An 1589. Vide  
et insignem lo-  
cum apud Camb-  
denum in An,  
1572 ubi de Fa-  
dera antiquo  
Gall. & Scot.*

However in all Leagues which tend to *Peace*, though there may remain somewhat, whereby words of ambiguity may arise; yet the most pious way of interpreting hath been to account the same rather *real* than *personal*, for all Leagues made for *Peace* or *Commerce*, admit of a favourable construction, *Leagues Defensives have more of favour, Offensive of burthen.*

Quintus said  
to Nabis, We  
have made no  
friendship nor  
society with  
thee, but with  
Pelops the just  
and lawfull  
King of the La-  
cedemonians.

XVIII. Leagues made with *Princes*, although they happen afterwards to be driven out of their Kingdoms by their Subjects, yet the League remains firm and good, for the *Right* of the Kingdom remains with such an unfortunate Prince, notwithstanding he hath lost his Kingdom: On the other hand, Leagues made with the *Invader* cannot be good; for his Cause being *unjust*, is odious; but if the People will make him King *de facto*, and invest him, the Question is then out of all controversy; for then he is become a King *Regnant* and by the Laws of *England*, if Treason be committed against his Person, and after he is beaten out, and the King *de jure* comes to his Crown, the King *de jure* may punish those Traitors with death.

• 11 Hen. 7.  
1.

9E.4.12.3 In-  
st. fol. 7.

The Earl of Warwick having raised an Army in France and Flanders, invaded England, and within five or six days after his landing,

Ed. 4. in An.  
1470.Phil. Comines  
lib. 3. cap. 6.  
Reges qui Regnis  
auxili sunt cum  
aliis regni bonis  
etiam sui legan-  
di perdidit.Peter Markes  
History of Fran-  
ce in the Life of  
Henry the Third.

ding, (King Edward's Forces betraying him) the Earl became Master of the Realm, the King flying for protection to his Kinsman the Duke of Burgundy, he kindly in his misfortunes entertained him; yet while he was in this banished estate, the Duke of Burgundy renewed the League with the English, it being agreed, that notwithstanding King Edward's misfortune, the League remained firm and unviolable between the Duke Charles of Burgundy, and the King and the Realm of England: So that for Edward they should name Henry (who was newly taken out of the Tower by the Earl of Warwick, at his chasing out of King Edward.) Now the true reason that Leagues remain, and are firm, notwithstanding such a change, is, because there goes along with them a tacite condition, viz. of holding their possessions, and therefore the World wondred not, that His late Sacred Majesty having sworn a League with the King of Spain, expressly as he was King of Portugal, did notwithstanding receive two Embassadors from the then new King of Portugal; and that without being judged either in England or Spain to have broken his former Oath and League.

The Duke of Guise having formed the League against Henry the Third, which was, that in regard the King was so could in the Profession of the Romish Faith, that it was in danger to be extinguish'd by the increase which he permitted of the Reformed Religion; especially seeing Henry the Fourth then King of Navar, was of that Religion, and was to succeed to the Crown; wherefore by the Mediation of Philip the Second of Spain, the Pope qualified the Duke of Guise, Head of that Catholique League, and which in point of Government was to set him above the King, avowed him Protector of the Catholique Faith in the Kingdom of France. When Henry the Fourth succeeded the Crown, then this League for security of Religion was most violent, and the Spaniard without, hoped, by nourishing thus the Division within, to carry all for himself at last. To avoid which gin, and to answer all, the King chang'd his Religion, and negotiated by d'Offas, to be received by the Pope as a dutiful Son of the Church of Rome; demanding absolution for what was past, and making large promises of due obedience for the time to come; the King of Spain's interest was that he should not be received, and thereupon he endeavoured to perswade the Pope, that King Henry did but dissemble with him, and that under this disguise he would easiest ruine the Romish Religion: notwithstanding this, the Cardinal obtained his Reception, Absolution and Benediction through the many promises and presents which he made to His Holiness, whereupon the Spaniards

*niards* designs were in a moment all blown over from *France*, but fell heavily upon the *United Provinces* which were sorely oppress'd, for that they apprehended the loss and ruine of their Country, and thereupon they implored assistance from King *Henry*, who received their Ambassadors very graciously, and gave them assurance of relief: The King of *Spain*, who wanted no good intelligence in the Court of *France*, immediately remonstrates to the *Pope*, that his former inclinations concerning *Henry's* Dissimulations did now appear in the face of all the World; and that seeing *His Holiness* had been so credulous, he knew not now whether they should be able to save the *Catholique Faith* from being suspected to the Reformed Religion or no: For whereas the *Hollanders* had revolted from him, onely because he resolv'd to use the true means for the establishment of the *Romish Faith* among them, and that now he was in a fair way of reducing them, which conduc'd so much (by *His Holiness* his Opinion) to the establishment of the *Romish Faith*; *Henry* had taken their party against him in that work: and that at *Paris* he had received their Ambassadors to that purpose, although he knew they were his lawful Subjects, &c.

This startled the *Pope* not a little, who charg'd d'Offat for having betray'd him, and put the Church in danger; this Argument was as subtil on the *Spaniards* side, as changing Religion was on King *Henry's*; and therefore the *Cardinal* was not a little perplex'd, how to answer it to the advantage of his Master; as also coherently to the considerations of his former reception into the Church: But at last he reply'd, That *His Holiness* need not wonder how in reason of State, those different Religions might joyn together for political ends, without hazard of altering Religion: Thus *David* sought protection of the *Philistines*, and *Abraham* redeemed the sinfull *Sodomites*: That he took it to be upon the same ground, that *His Holiness* himself not long before, received a *Persian Ambassador*, who was so far from being an *Heretick*, that he never pretended to the name of Christian: That it was a plausible Argument, which the King of *Spain* us'd, in complaining of *Henry's* receiving and avowing their Ambassadors, especially knowing at the same time that they were Rebels, and could pretend no Right nor Title separate from his Crown: For Princes (quoth he) when Ambassadors are address'd to them, never inform themselves of the Rights and Title of those Princes from whom they are sent; but whether they have possession of the Force and Power of those places from whence the Ambassadors are employ'd, for it would be

an



an endless task, and require an infallible true History of the World (which is not to be made by Man) if all the Ambassadors before their receptions should be obliged, first to prove clearly to the World the just Right by which their Masters derive those Titles and Jurisdictions, which they assume to themselves.

*In Regno diviso  
gens una, pro  
semper quasi  
dua gentes ha-  
bentur: And  
Princes are to  
have an eye to*

the Power which each Kingdom hath to afford benefit one to the other, and not to examine their Titles.

## C H A P. VIII.

## Of Alliances unequal, and of Protection.

- I. Of Alliances unequal, as in reference to the acknowledging a Superiority or Protection in another.
- II. Of protections by a Prince or State voluntary or mercenary.
- III. Of the Duty incumbent on the protected, and the obligation in Honour and Justice on the Protector.
- IV. Of Alliances unequal, and of the ordinary causes that may tend to a rupture of the same.
- V. Of the causes extraordinary that may occasion the breach of such Alliances.
- VI. Of Faith and assurance implicitly discharged by the delivering of Hostages.
- VII. Of the differences of Leagues contracted by Princes, through force or fear, and private Contracts made with private persons by reason of the same.
- VIII. Ambiguity in words given occasion to Princes to depart from the League, and of the Reputation of Princes on such occasion preserving the Alliance.
- IX. Of the firmness and assurance of Alliances whether to be found more in Princes, or in Republics.
- X. If one party hath violated the League, whether it be lawful for the other to depart from the same.
- XI. In the construction of Leagues, the thoughts not the words of Princes to be considered.
- XII. Of things favourable, things odious, and others of a mixt nature to be used in the interpreting of Leagues.

I. **U**Nequal Alliance is that which is contracted betwixt Princes or States unequal in Honour, or in Power, with unequal conditions, the acknowledging the other, not for Master or Lord, but by Honour as the more powerful, and the better qualified, and some for Protector; and these Treaties are made with those States, which take or give Pension, or which put themselves into Protection. Tribute is paid by the Subject, or by him, who to enjoy his Liberty, payes that which is agreed upon to him that hath forced him to do it. But a Pension is held voluntary from him that is in Protection, or from him that is in all other things equal to the Treaty of Alliance to hinder the Pensioner, that he joyn not with the Enemy, as the Swiss to the French, or to have aid and succours from him.

stronger have more honour, and the weaker have more help: Proculus adds, that such a clause is inserted in the League, to signifie the one is superiour in Authority and Dignity, for both are free, but are *sub patrocinio, non sub ditioe*. Livy lib. 37. Cicero Offic. 2.

*Andronicus Rhodius post Aristotelem, Amicitia inter partes hoc aut proprium, ut potestiori plus honoris, inferiori plus auxilii deferatur. Grocius lib. 1. cap. 3. § 21. num. 2.*

It is the property of friendship 'twixt unequals, that the

*Leg. non dubit.  
D. de Cap.*

The *Genoises* having put themselves in the protection of the French King, revolted; he thereupon changed their conditions into Priviledges to the end it might be in his will to deprive them when he should think fit. *Vide Cardinal Thuyt. P. P. Concl. 935.*

This holds as well between Leagues equal as unequal.

*Grot. de Jure Belli & Pacis, lib. 1. cap. 3. §. 21.*

This hath the same right in Leagues that are equal. *Nam ut quis ultionem sumat ab eo qui peccavit, satis est ut ipse et qui peccavit subditus non sit.*

*Grot. de Jure B & P. lib. 1. cap. 3. §. 21. n. 5.*

But that proves not any power of commanding, for Princes do usually try their causes before Judges of their own choosing.

II. But that *Protection* is most true and Honourable, when a *Prince* or *Republique* takes upon him the defence of another, *freely without reward*, though some, if not all, find it most necessary to ballance honour with profit, from this maxime, *That a pecuniary interest obliges more to succour, than when barely obliged by Oath.*

III. By the Law of *Protection*, he that is protected owes all *Respect* and *Honour* to his *Protector*, against whom if he conspire or attempt, or strays from his Duty, it is lawful for the *Protector* to make better assurance; nay, if he pleases, to make himself *Master*: But then on the other side, the *Protector* ought to defend and succour the Protected, and use him well; for otherwise he may withdraw himself from the *Protection*, and seek another.

IV. In Alliances that are unequal, there are four kinds of Controversies may happen.

First, if the Subjects of a Prince or Republique, that is under the protection of another, have committed any thing against the League.

Secondly, if the Prince or Republique be accused.

Thirdly, if the Fellows, which are under the protection of the same Prince or Republique, contend with one another.

Fourthly, if the Subjects complain of their own Ruler.

To the first, if a fault appear, the Prince or Republique is bound either to punish the offender, or render him up to the party injured, and see or endeavour that damages may be recovered.

But one of the *Associates* in the League, hath no right to apprehend or punish the Subjects of his Confederates.

To the second, the *Confederates* hath a right to compel his Confederates to stand to the League, and if he will not, to punish him; for that one may take satisfaction or revenge of him that hath offended; and this happens as well amongst those that have no Confederation at all.

To the third, as in Confederacies equal, the Controversies are wont generally to be brought before an *Assembly* of the Confederates; that is to say, such as are not concerned in the question, or else before *Arbitrators*, or else before the *Prince* of the *Association*, as a Common Arbitrator.

So on the other hand, in a League unequal, it is agreed for the most part, that the Controversies be debated before him who is *Superior in the League*.

To the last, the *Confederates* have no *Cognizance*. In common Affaires out of time of Assembly, even where the League is equal, the Custom is for him who is chose *Chief of the League*, to have command over the Confederates, according to the Speech of the *Criminians*

*Antians in Thucydides, It becomes them that are Princes of the League, not to seek their own particular advantage, but to content themselves with an eminency above the rest, in taking care of the Common Interest.*

V. Though that the breach of Faith be much practised in such affairs; yet there are few Princes found, which have not found a pretext, some have pretended to be circumvented by Error, others by change of Affairs have pleaded an excuse, as great wrongs or inevitable loss, and apparent danger of the ruine of their States, which are the causes, wherein some say, that an Oath is not obligatory; the Condition, by reason of the Oath, being impossible or unjust to these limitations, some hold they must not keep Faith with an Enemy of the Faith, nor with him that hath broken his, nor with a Subject, nor with a Thief or Pirate; certainly if it be not for lawful a Man in these Cases to keep Faith, it is not lawful to give it: If it be lawful to capitulate with such Men, it is necessary to hold that we promise, that is, (we presume) when the word is given by him that may give it, and that they rely upon it.

VI. If Hostages are taken, he that gives them is freed from his Faith; for that in receiving Hostages, he that receives them hath relinquished from the assurance, which he had in the Faith of him that gave them; so where a Captain for his Prince gives his word without Commission it binds not the Prince.

VII. Some Lawyers would judge of Treaties as particular Contracts, by which means they would stretch the Consciences of Princes; for, say they, that as a private Man is not bound by that which he hath promised by force or fear, so it ought to take place amongst Princes and in Treaties which are made betwixt Sovereigns, but that is ridiculous, for that were in effect to banish Faith from all publique Negotiations; for there is no Treaty but is usually made in Arms, by Force or through Fear: to lose either Life, or Goods, or Liberty, or the State; which are causes of just fear, and may shake the most constant.

VIII. Some Princes desirous to shew themselves more Religious in these Ruptures, have taken subject and occasion upon the ambiguity of some clauses in the Treaty, or upon equivocation, as Charles the fifth did, or else they seek other occasions, as attempting against those whom their Allie is bound to defend; to the end, that drawing him into the Field, *He may lay the cause of Rupture on him.*

But Princes, who respect such Treaties with a pious intention of preserving them, alwayes remain constant and firme; and though occasion may offer it self, by which they might get advantage by the breach;

rod. lib. cap. 3.

§. 21. num. 6.

Dicit eos qui

Fœderis Principes

sunt, circa

suas quidem uti-

litates nihil pra-

cipuum sumere;

at in communi-

bis rebus curan-

dis eminere supra

ceteros. In Orat.

Corinthiorum.

Oleadaus

Conse. 1.

Gregorius Pre-

jurum Deo cul-

pam impugnat

negligentia.

Upon the words Eving and Enig. to retain the Landgrave of Hesse

breach; yet when they remain durable, such respect is afterwards had to their Word and Honour, that fewer and lesser securities will be demanded of them, than of one *whose Faith is doubted*.

IX. But assurances in cases of this nature have been found more in *Republicques* than in *Princes*; for though *Republicques* have the same mind, and have the same *intentions* as *Princes*, yet for that they move but slowly, it will cause them to stay longer in resolving: Famous is that of the *Athenians*, when *Themistocles* in his Oration told them, That he could discover a matter in which the *Athenians* would reap great advantages, but he could not tell it, for fear the discovery would take away the opportunity of achieving it: whereupon the *Athenians* deputed *Aristides*, to whom he should communicate the secret, and with him should consult about the ob-

Famous was the answer of the *Carthaginians* Senate to the *Romans*, upon the assaulting of *Saguntum*; *Ego an privato publice consilio Saguntum oppugnatum, non querendum censeo; sed utrum*

*jure an injuria; nostra enim hac questio atque animadversio de Civem nostrum est, nostrum an sed fecerit arbitrio, voliscum una disputatio est, licuerit ne per sedus fieri: Whether Saguntum was assaulted by private or publique Counsel, we conceive it not to be made the question; but this, whether it was assaulted justly or unjustly; for to our selves an account is to be given by our Citizens, whether he did it of himself, or by Commission; with you alone this is disputable whether it were a violation of the League, or no. Livius lib. 31.*

taining it, they meeting *Themistocles* demonstrated that it was in the power of the *Athenians* to make themselves Masters of all *Greece*, for the *Grecian* Naval Army was then in their Ports and Protection; whereupon *Aristides* reply'd, *The same was a breach of Faith*: But it was answered, *it being for the publique, all considerations of that kind ought to be laid aside*; whereupon *Aristides* being called by the People to give a Report, told them, *Themistocles's Advice was exceeding profitable, but dishonest*, for which cause the People wholly refused it.

X. If one party has violated the League, the other may most certainly depart from it, for the transgression of the Articles, be it never so little, makes a *breach of the Agreement*; unless it be otherwise prevented by *Condition*, which may be, by inserting into the same, *That for every Offence it may not be lawful to depart from the League*.

† *Grotius de Jure Belli ac Pacis, lib. 2. cap.*

*15. §. 15.*

*In fide quid sensum, non quid dixeris cogitandum. Cic. de Off. 1.*

XI. In all *Leagues*, the thoughts of *Princes* and *States* are to be considered, not what they said; yet because internal Acts are not visible by themselves, it is necessary that somewhat certain should be determined, *i. e.* reduced to *Heads* or *Writings*; otherwise there would be no obligation at all, for then every one might free himself by affixing on his own words what sense he pleases: Hence it is, that by the dictates of *Natural Reason*, he, to whom any thing is promised, hath a right to compel the promiser, to that which right

right *Interpretation* suggesteth, for otherwise the matter would have no end.

XII. In the *Interpretation* of Leagues and Truces, there ought to be a very great care had, in regard of the *Sacredness* of them; therefore in things promised or secured by such Leagues, some are favourable, some odious, some mixt, or of a middle nature. Those that are most favoured, are those whose words tend to Peace; not to War; whose foot-steps leave ever behind the deep impressions of Misery, Devastation and Poverty, but more especially when such Leagues are made for *War Defensive* than otherwise; but those are called *odium*, which *burden* or *oppress* one part only, or one more than the other, and likewise such as tend to matter of *Revenge* or *Punishment*, or to *violate* some former acts, or obligations, or the *bringing in a change* or *innovation* of what *been constantly settled*, and *used before*. Mixt, as where a change is propounded; but that is with the Sisters of *Moderation* and *Peace*, which are proportionably good, according as the change may be esteemed. — Therefore the Standard Rule is, that in Leagues and Treaties *not odious*, the words are to be taken according to the full extent and propriety of popular use; and if there be more significations, the largest is best: on the other hand we are not to recur to significations plainly improper, unless otherwise some absurdity or inutility of the agreement would follow: Again, words are to be taken ever more strictly than propriety suffers, if it be necessary for the avoiding of *inequity* or *absurdity*. But if there be not such necessity, *manifest equity* or *utility* in the restriction, we are to stay them within the narrowest bounds of propriety, unless the circumstances dissuade; on the other hand in *Leagues* or *Promises odious*, even a figurative speech is admitted, to avoid the *odium* or burthen; therefore in *Donation*, *Remission* of ones *Right*, *Dominion* or *property*, they are always to be construed to those things, which were probably thought on, and really intended. So Aids and Succours promised from one part only is to be understood to be due at the *charges of him who shall acquire them*.

*In L. non possunt.  
D. de Legibus.*

*Vid. exemplum  
in L. cum vi-  
rum. C. de fidei  
commissis.*

*Grotius lib. 3.  
cap. 16. §. 12.*



## CHAP. IX.

## Of Treaties of Truce and Neutrality.

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|---|--|
| <p>I. Of <i>Treaties</i>, the various sorts.<br/>         II. Of <i>Rules</i> in Cases doubtful.<br/>         III. Of <i>Truces</i> amounting to a Peace.<br/>         IV. Of the advantages between <i>Treaties</i> of truce and Peace.<br/>         V. How preserved and punished in England.</p> | <p>VI. Of <i>Treaties</i> of Neutrality, the various sorts.<br/>         VII. Of the advantages of the same.<br/>         VIII. In Cases of necessity where he ought to declare, and for whom.</p> |
|---|--|

I. **T**reaties are either with *Enemies* or *Friends*, or with Persons which desire to continue *Neuters* with us, or we with them. The *Treaties* which are made with our *Enemies*, are either for a time, or perpetual.

*Perpetual*, as the Peace that is made to compose all differences, and the War that is undertaken for *Conquest*, or for *Reparation* of injuries, or to restore the *Commerce*.

*Treaties* which are made for a time with our *Enemies*, are called *Truces*, the which are either *General*, for all the States of the one or the other Prince, for all Persons, and for all sorts of *Commerce*: Or else they are *Particular*, for certain *Places*, for certain *Persons*, and for the *Commerce*.

In the Truce that was made between *Edw.* the 4th, and *Le-wis* the 11th, there was like provision made for *Charles* Duke of *Burgundy*, but he refused, and concluded a Peace for himself apart, being angry with *Edward* the 4th, for making the same. *Philip. Com. lib. 4. c. 40.* So *Lewis* the 11th concluded a Truce for nine Years with *Edward* the 4th when he had invaded France. *Phil. Com. lib. 4. cap. 8.*

III. Sometimes a General *Truce* holds the place of a *Peace*, as that of a hundred years. Such *Truces* are commonly made betwixt Princes that are equal in Power, and will not quit any thing of their *Rights* by Peace: and yet desire to live quietly in the State wherein they are, *satis fying by his medium, the point of Honour.*

IV. *Treaties* of *Truce* are many times less subject to *Rupture* than a *Peace*, which is made perpetual; for Princes or States that find themselves aggrieved with a Treaty that is perpetual, seek out plausible reasons or forsake it, seeing the grievance cannot be otherwise repaired, but if the time be limited and expired, they may pursue that which they think ought to be granted, and the other may oppose, and if they have a desire to continue the *Truce*, there is nothing so easy as

to renew it. Hence it is become a *Maxime* in State, *That seeing Treaties are grounded on the Interests of Princes which change with the time, it is necessary to change and sever them at the end of the time, or to break them off:* for it is in vain to trust to a bare Friendship.

A *Truce* is likewise made to advance a Peace, and to treat it; so likewise it is sometimes promoted for the more honest discharge of a *League*, which is made with some other Princes, whom they have accustomed to comprehend therein: so as a Peace following it, or a *Truce* not being accepted by him, they take occasion to leave the *League*, *it being not his fault that leaves it, that the War was not ended.*

And although it seems that a *Truce* cannot by its condition prejudice the *pretension* in the *Principal*; yet it is most certain, that if he which is chased out of a contentious State, consents, that during the *Truce*, the *Commerce* shall be forbidden to his *Subjects*, he doth wholly stop the *Gate*, \* as *Lewis* the 12<sup>th</sup> did in the *Truce* which he made with *Consalve*, after the Conquest of the Realm of *Naples*.

In *England* by the *Stat. 2 H. 5. cap. 6.* Robbery, Spoiling, breaking, of *Truces* and *Safe-Conducts* by any of the Kings Liege People, and *Subjects* within *England*, *Ireland* and *Wales*, or upon the main Sea, was adjudged and determined to be High-treason; but this branch concerning High-treason, is Repealed by the *Stat. of 20 H. 6. cap. 11.* but by the said *Act* of 2 *H. 5.* for the better observation of *Truces* and *Safe-Conducts*, *Conservator Induciarum & salvorum Regis conductuum*, was raised and appointed in every Port of the Sea by Letters Patents, his office was to enquire of all Offences done against the Kings *Truces*, and *Safe-Conducts* upon the main Sea (out of the Counties, and out of the Liberties of *Cinque-Ports*) as *Admirals* of Custom were used to do. Sir *John Trebiel* was committed to the *Tower*, for taking a *French Ship*, and being brought into *Parliament* did there justify the same; but at last confessed his fault, and begged the Kings Pardon: † Generally all *Leagues* and *Safe-Conducts* are, or ought to be of Record, that is, they ought to be Inrolled in the *Chancery*, to the end the Subject may know who are in Amity with the King, and who not: who be Enemies, and can have no Action here, and who in *League*, and may have Actions personal here.

Sometimes they have been inrolled in the *Wardrobe*, as being matters of State.

Note, In all *Treaties*, the Power of the one Party, and the other ought to be equal; nor are they to be held firm till raised.

\* For the Right remains with him: however, he hath lost the possession. *Gror. de lure belli ac pacis, lib. 2. cap. 16. §. 18.*

2 *H. 5. cap. 6.*

20 *H. 6. cap. 11.*

† And at the Request of the Lords and Commons was pardoned, he making satisfaction for the loss.

11 *H. 4. ad Parliament. tent. quinden. Hill. Vid. Cotton Abridgm. 19 E. 4. 6. B. 18. H. 6. cap. 4. 10. H. 6. cap. 1.*

19 *E. 4. 6. B.*

Maxime.

Rot. Scotia de  
An. 10 E. 3. m.  
36. intus de pu-  
niendo illos qui  
contra formam  
Tregua homini-  
bus de Scotia  
concessa deliqu-  
erint.

Before the *Statute* when any breach of Truces or Leagues happened, or was occasioned by the misdemeanours of any of the King of England's Subjects, there did usually issue forth Commissions under the *Great Seal of England*, to enquire of the infringers of the same, and to punish and award satisfaction to the injured.

VI. Princes who neither love nor hate any thing absolutely, seem generally inclined to *Neutrality*, and in that govern themselves in their Friendships, according to their interests; and *Reasons of State*, in effect is no other but *Reason of Interest*.

*Neutrality* may be of two sorts; the one with *Alliance with either part*, the other *without Alliance*, or so much as the least tie to the one or other; which is that which properly may be called *Neutrality*.

The first is governed by the *Treaty of Neutrality*, the latter by the *Discretion of the Neuter Prince*, whose carriage ought always to be such, as that he may not give the least glimpse of inclining more to one than to another.

VII. The advantages of *Neutrality*, are, that the Neuter Prince or Republique is honoured and respected of both Parties, and by the fear of his declaring against one of them, he remains Arbitrator of others, and Master of himself.

And as a Neuter purchases Friends, nor *freed himself from Enemies*; so commonly he proves a prey to the Victor: hence it is held more advantage to hazard in a Conquest with a Companion, than to remain in a State wherein he is in all probability of being ruined by the one or the other.

But Princes that are *powerful*, have used generally to preserve a *Neutrality*: for whilst petty Princes and States ruin themselves by War, he fortifies himself with *means*; and in the end, may make himself Judge of their differences.

On the other hand, it hath been conceived, that Republicues that are weak, what part soever they take, it will be dangerous unto them, especially if they are in the midst of two more powerful States than themselves; but Experience hath made it appear to the contrary, that *Neutrality* is more beneficial to a *weak Prince or Republique*; so that they that are at War be not barbarous or inhumane; for although a *Neutrality* does not please either Party, yet in effect wrongs no Man; and as he doth not serve, so he does not hurt; besides his Declaration is reserved till the issue of the War, by which means he is not obliged by siding with either Party, to gain or lose by the War.

VIII. But if the Neuter be prest by necessity to declare himself, he must do it for the most powerful of the two parties, following that

Roman

Much practised  
by the Free  
Princes and Sta-  
tes of the Empe-  
re.

† An. 1674 Con-  
sul. Quintus ad  
Achæis, quod

*Roman Maxime*, That either they must make themselves the strongest, or be a friend to the strongest, So they of *Strasbourg* † declared for the Empire against the French; on the other hand, if the Neuter sees, that joining to the weaker, will ballance the power of the stronger, and by this counterpoize reduce them to reason, the same hath been generally followed upon the *Maxime*, That the safety of States consist chiefly in an equal counterpoize of the one and the other; for as the greatness and opulency of a Prince draws after it the ruine of their Neighbours, it is wisdom to prevent it.

*optimum esse dicant non interponi vas bello: imo nihil tam alienum rebus vestris est: Quippe sine gratia, no dignitate, primum victoris eritis. Lucius lib. 35. Scripta Ammiras discipulis. lib. 18 discipulis.*

## CHAP. X.

## Of the Immunities and Privileges of Ambassadors, and other publique Ministers of State.

- I. Of the Function of Ambassadors and Agents generally.
- II. Of their Right and Protection by the Laws Divine, and of Nations.
- III. Of Precaution, whether the same may be given to such not to come, and attempting against such interdiction, how dealt with, and of punishment of those that shall hurt them by the Laws of England.
- IV. Of the several Causes, that Princes or Republics may reject such publique Ministers of State.
- V. Where Ambassadors may be subjected to punishment by the Laws of Nations.
- VI. Of the proceeding against them by Princes and States at this day, according to the practice of Nations.
- VII. Of the various proceedings against them by several Princes and Republics, illustrated in fifteen Precedents of examples.
- VIII. Of the proceeding against them, according to the practice of England.
- IX. Ambassadors, where they forfeit their Privilege by the Laws of England.
- X. Where actions committed by them, though against the known Laws, yet oblige them not to a forfeiture of their Privilege.
- XI. Of the Duty of Ambassadors in Cases Civil, and what their Office includes for the King and Nation, whom they represent.
- XII. Whether the House of an Ambassador can be a Sanctuary, or whether he may exercise a Royal Jurisdiction over his Servants and Vassals; whether the same proceeds from the Laws of Nations.
- XIII. Whether the Goods of an Ambassador may be seized for debt, or other Contracts.
- XIV. Whether Out-rages committed by publique Ministers of State, can subject them to punishments.
- XV. Of the punishment of those that commit any Out-rage on them.
- XVI. Some Observation of the immunities and Government by the Laws of Venice of their Ambassadors.

I. **A**N Ambassador and Agent is the same thing, if we consider only the Function of their Charges: only in this they differ; an Agent hath charge to represent the Affairs only, but an Ambassador ought represent the Greatness of his Master, and of his Affairs.

II. The Right of Ambassadors is secured both by the Safeguard of Men, and also by the protection of the Law Divine; therefore to violate this, is not only unjust, but impious too: and as Protection is

*Pompon. Leg. si quis D. de Legationibus.*

*Livy lib. 1. 6.*

Kings conquered in a solemn War, and deprived of their Kingdom with other Royalties, lose the right of Legation. *P. Æmilius* detain'd the Heralds of *Perseus*, whom he conquered.

† *P. People* a Traitor, fled to *Rome*, the *Pope* sent him Ambassador to the *French King*, of whom the *King of England* demands his Subject, *Sed non praelis. Coke Instit. 3. fol. 153.*

given to the *Legates* of *Supream Rulers* by the *Laws of Nations*, so by the *Civil Law*, there is a protection likewise for *Provincial Legates*, and *Heralds*, &c. This Right of Legation was originally provided, saith *Livy*, for a *Forreigner*, not a *Citizen*; yet in *Civil Wars*, necessity sometimes makes place for this Right besides the Rule, as when the People are so divided into equal parts, that it is doubtfull on which side the Right of Empire lieth, as that unhappy spot of *Flanders*, or when the Right being much controverted, two contend for the succession to the *Throne*; for in this Case one Nation is reckoned as two, and so was the State of *England*, when the *House of York* and *LANCASTER* contended for the *Crown*; nay, this Right of Legation hath been so preserved, that the very Messengers of Rebels have been protected, as were those of *Holland* by *Philip of Spain*: So great a respect † have Nations had in all times to such Men, that even *Pirats* and *Robbers*, who make not a Society, nor have any Protection by the *Law of Nations*, and with whom neither Faith nor Oath (as some conceive) may be kept; Faith being given them, obtain the right of Legation, as once the Fugitives in the *Pyrenean Forest*.

III. *Ambassadors* may by a precaution be warned not to come, if they dare, they shall be taken for Enemies; but once admitted even with Enemies in Arms, much less with Enemies not in actual Hostility, have the protection and safe-guard of the *Laws of Nations*; and therefore their Quality being admitted by safe-conduct, they are to be preserved as Princes; and so it was declared in *Parliament*, where the killing of *John Imperial*, Ambassador from the States of *Genoa*, was High-treason, *Crimen lese Majestatis*.

*Rot. Pat. 3 R. 2. num. 18.*

\* *Legatus ejus vice fungitur à quo destinatur, & honorandus est sicut ille cuius vicem gerit, & Legatos violare, contra jus Gentium est.* 22. *Assize pl. 49.* Note, this was three years before the making of the Stat. of 25 E. 3. *Quare*, if such a *Prorex* is within the Stat. at this day.

\* So likewise of *A. de Walton*, the Kings Ambassador, *Nunciium Domini Regis missum ad mandatum Regis exequendum*, who

was murdered by one *John Hill*, for which offence it was adjudged High-treason, and accordingly he was drawn, hang'd and beheaded.

IV. On the other hand, Ambassadors may not always be received, though alwayes they ought not to be rejected; for there may be cause from him from whom they come, as the *Roman Senate* would not admit of the Ambassage of the *Carthaginian*, whose Army was then in *Italy*; the *King of Spain* those of *Holland*, and the then *Pope*

*Cambd. 1571. questionum ibi pro posticarum quarta.*

the



the Ambassadors of *Henry 2<sup>d</sup>* after the murder of *Becket Arch-Bishop of Canterbury*: so likewise from the very Persons that are sent, as *Theodorus Aibest*, whom *Lysmachus* would not give Audience to, and *M<sup>r</sup> Oliver*, *Lewis* the eleventh's Barber, whom they of *Gauis* refused.

So likewise where the cause of sending is suspected, as in reference to disturb the People, or intentions rather to sow Sedition than to conclude a Peace (if such be their errand) or not honourable or unreasonable; as for those assiduous Legations which are now in use, they may with very good right be rejected; for there no necessity of them appears, by the Ancient Custome whereto they are unknown.

The *Venetian* having admitted *Henry* the Fourth of *France* his Ambassador, yet they interdicted him † to come with the other Ambassadors to the Chappel, till the King was reconciled to the Church of *Rome*.

V. By the Laws of Nations, only unjust force is kept from the Bodies of Ambassadors; for if the Laws of Nations be broken by him, he is subject to punishment.

Yet the Opinion of Nations and Men Eminent for Wisdom, have been doubtful in this point, and Precedents on both sides have been avouched, one which seems to refuse that position of punishing such Ministers of State: The Ambassadors of *Tarquin*, who had committed Treason at *Rome*, \* and as *Livy* observes, were in the State of Enemies; yet the *Right of Nations*, as he calls it, prevailed so far as to preserve them, although in a case of hostility: On the other hand, † *Salust* observes, that *Bomilcar*, one of the *Carthaginian* Ambassadors, who came to *Rome* on the Publique Faith,

loco essent, jure tamen Gentium valuit. † Fit reus magis ex aquo beneque quam ex Jure Gentium. *Bomilcar* comes ei qui *Romam* fide publ. venerat.

was adjudged guilty, rather (saith he) by the Rules of Equity, than by the Laws of Nations; Equity, that is the meer Law of Nature suffers punishment to be exacted where there is found a Delinquent; but the Laws of Nations except the Persons of Ambassadors; for certainly their security outweighs the profit arising from punishment which may be inflicted by him that hath sent him (if he be willing) if unwilling, it may be exacted of him as an approver of the crime.

without leave. For if they go to, or come from their Enemies, or make any they may be slain. *Livy lib. 16.*

VI. Again, as Ambassadors are not to render a reason of their actions to any other, but him by whom they are sent, and it is impossible,

*Daniel's Hist. of Henry the Second.*

*Carolus quintus Imp. Gallia Venetorum & Florentinorum ad bellum sibi indicendum missos deduci jussit in locum qui a comitatu suo abesset triginta miliaria. Guic. l. 18. Bollandus lib. 3.*

† *Card. Arnold Offici. in his 353 Epistle. Copt. 4. Inst. 153.*

*Menander Prosector Justino Imper. Avarorum Legatos contra jus Legationum in vinculis habuit Coshmannum Resp. 32. num. 29. Co. Inst. 4. 153. 2 H. 5. cap. 6. 2 H. 6. cap. 11.*

\* *Quaquam visi sunt commisisse ut Hostium.*

An Enemy is bound to whom they are sent, but their Privilege obliges not thole through whose bounds they pass hostile attempt,

Grotius de jure  
Bell. ac Pacis.  
lib. 2. cap. 18.  
§. 4. nu. 4 & 5.  
Senatus faciem  
secum attulerat,  
auctoritatem  
Reip. M. Tull. 8

\* Co. Instit. 4.  
fol. 152.

Sic Carolus  
quintus Legato  
Ducis Medio-  
lanensis ut sub-  
diti sui imper-  
ravit, ne à Comitatu suo abscederet, Guicciardini indicat. jam loc.

Hill. 13 Eliz.  
Bishop of Rosses  
Case. Co. 4. Inst.  
152.

possible, but by the reason of various *Interests*, and other *secrets* of State, which pass through their hands, somewhat may be said, which bears a show or face of Crime, (which perhaps may prove otherwise;) yet the examining and tracing of the truth, may be of a dangerous consequence; and therefore if the offence be such as may be contemned, it is usually to be dissembled or connived at, or else the Ambassador be commanded to depart the *Realm*; and if the crime be cruel, and publicly mischievous, the Ambassadors, may be sent with *Letters of Request* to His Master to inflict punishment, according to the offence: So likewise in the precaution of a great mischief, especially publique, (if there be no other remedy) Ambassadors may be apprehended and executed; and if they oppose by force of Arms, they may be slain.

In the Bishop of Rosses Case, An. 13 Eliz. the question was, *An Legatus qui rebellionem contra Principem ad quem Legatus con- cernit, Legati Privilegium gaudeat, & non ut hostis penis subjaceat*; and it was resolved, that he had lost the Privilege of an Ambassa- dor, and was subject to punishment; nor can Ambassadors be de- fended by the Law of Nations, when they commit any thing against the State or Person of the Prince with whom they reside.

And why Ambassadors are in safety in their Enemies Countries; and are to be spared when they commit offences, is not so much for their own or *Masters* sake, but because without them there will never be an end of hostility, nor Peace after Wars: neither is the *Name* or *Person* of an Ambassador so inviolable, either in Peace or in time of War, but there may be both a convenient time and a good occasion to punish them, and this standing with the Laws of Nations.

VII. The Signiory of Venice understanding that certain Traytors, who had revealed their *Secrets* to the Turk, where fled for protection into the House of the French Ambassador at Venice, sent Officers to search the Ambassador's House; but the Ambassador refusing them entrance, the Senate commanded certain Cannon to be brought out of the Arsenal to beat down his House, which when he saw planted, he surrendered up the Traytors.

(1.) The Ambassadors of Tarquin, *Morte affigendos Romanis non judicantur, & quanquam visi sunt ut hostium loco essent, jus tamen Gentium valuit.*

August. de Leg.  
Antiq. Rom.

(2.) The State of Rome, though in case of most capital crimes, exempted the Tribunes of the People from question during the year of Office.

(3.) The

(3.) The Ambassadors of the Protestants, at the Council of Trent, though divulging there the *Doctrine* of the Church, contrary to a Decree there Enacted, a Crime equivalent to Treason, yet stood they protected from any punishment.

*Acta Trident. Concilii.*

It is generally consented by all the *Civilians*, That *Legatus de jure Gentium indictum est, ut eorum corpora salva sint, propter necessitatem Legationis, ac ne confundantur iura commercii inter Principes.*

*Pompon. Leg. ult. D. de Legatis.*

(4.) *Viva*, the *Popes Legate*, was restrained by *Henry* the Second, for exercising a Power within his Realm, not allowed or admitted of by the King, in disquiet of the State, and forced to swear not to act any thing in *præjudicium Regis vel Regni*.

(5.) On the other hand, it has been answered, that they are by the Laws of Nations exempted from Regal Trial, all actions of one so qualified, being made the act of his Master, or those whom he represents, until he or they disavow, and Injuries of one *Absolute Prince* or State to another, is *factum hostilitatis*, and not Treason; the immunity of whom *Civilians* collect as they do the rest of their grounds from the practice of the *Roman State*, deducing their Arguments from these Examples; The *Fabii* Ambassadors from *Rome* were turn'd safe from the *Chades*, with demand of Justice against them only, although they had been taken bearing Arms with the *Ethurian* their Enemies, *Titus Liv. 2. Dec.*

*Benedict. in Vita Henr. 2.*

*Colloquium Machiav. lib. 2. cap. 28.*

(6.) King *Edward* the Second of *England*, sent amongst others a *French Gentleman* Ambassador into *France*; the King upon this Arraigned him as a Traytor, for serving the King of *England* as Ambassador, who was his Enemy; (but the Queen procured his pardon.)

(7.) *Henry* the Third did the like to one of the *Popes* Ambassadors, his Colleague flying the Realm secretly, fearing *rimens pelli sui*, as the Record has it. *Edward* the First restrained another of the *Popes* turbulent Ambassadors, untill he had (as his Progenitors had) informed the *Pope* of the fault of his Minister, and received satisfaction for the wrongs.

*Rot. Scaccar. Westm. Claus. Edw. primi.*

(8.) *Henry* the Eighth commanded a *French* Ambassador to depart presently out of the Realm; but because he was the professed Enemy of the Seat of *Rome*.

(9.) *Eccuis de Pras*, Ambassador for *Charles* the Fifth, was commanded to his House, for accusing falsely *Cardinal Woolsey* to have practised a breach between *Henry* the Eighth and his Master, to make up the Amity with the *French* King 1523.

(10.) Sir *Michael Throgmorton* by *Charles* the Ninth of *France* was so served, for being too busie with the *Prince of Conde* his Faction.

(11.) The *Pope's* Ambassador at *Paris* was arraigned for practising certain Treasons in *France*, against the King in the *Parliament* of *Paris*, and was there found guilty, and committed to Prison.

(12.) *Dottor Man* in the Year 1567, was taken from his house at *Madrid* in *Spain*, and put under a Guard to a straiter Lodging, for breeding a scandal (as the *Conde Teri* said) in using by Warrant of his place the Religion of this Country, although he alledged the like permitted to *Guzman de Silva* their Ambassador in *England*, and to the *Turke*, no less than in *Spain*.

(13.) *Francis* the First King of *France*, sent *Cesar Tregosus*, and *Anthony Rincone*, Ambassadors to the *Turk*, they were surprised by the Armies of *Charles* the fifth, on the River *Po*, in *Italy*, and were put to death; the *French* King complained that they were wrongfully murdered, but the *Emperor* justified their death; for that the one was a *Genois*, and the other a *Milanois*, and his Subjects feared not to serve the King his Enemy.

(14.) *Henry* the 8<sup>th</sup> being in League with the *French* and at Enmity with the *Pope*, who was in League with the *French* King, and who had sent *Cardinal Poole* to the *French* King, of whom *Henry* demanded the *Cardinal*, being his Subject, and attainted of Treason, *sed non prevailuit*.

(15.) *Samuel Pelagii*, a Subject to the King of *Morocco*, pretended that he was an Ambassador sent unto the *States General* of the *United Provinces*; he came to them, and accordingly they did treat with him, afterwards he departed, and being upon the Sea, he did take and spoil a *Spanish* Ship, and then came into *England*; the *Spanish* Ambassador here having received intelligence of the spoliation, caused his Person to be seized upon, intending to proceed against him as against a Pirat, and imprisoned him, and upon Conference with the Lord *Coke*, *Dordridge*, and other Judges and *Civilians*. they declared their Opinions, That this Caption of the *Spaniards* Goods by the *Morocco* Ambassador, the same is not in Judgement of Law a Piracy, in regard it being apparent that the King of *Spain* and the King of *Morocco* are Enemies, and the same was done in open Hostility, and therefore in Judgement of Law could not be called Spoliatio, *sed legalis Captio*, and a Case out of 2 R. 3. fol. 2. was vouched, where a *Spanish* Merchant before the King and his Council, in *Camera Scaccarii*, brought a Bill against divers *English* Men therein setting forth *quod depradatus & spoliatus fuit* upon the Sea, *juxta partes Britanniz, per quendam Virum bellicosum de Britannia de quadam Navi*, and of divers Merchandizes therein, which were brought into *England*, and came into the hands of di-

vers *English-Men*, naming them, and so had process against them, who came in, and pleaded; that in regard this depredation was done by a Stranger, and not by the Subjects of the King; therefore they ought not to be punished, in regard that the *Statute* of 31 H. 6. Cap. 4. gives restitution by the *Chancellor*, in *Cancellaria sibi vocato uno Iudice, de uno Banco vel altero*; and by the *Statute* of 27 Ed. 3. Cap. 13 that the restitution may be made in such a Case upon proof made, by the *Chancellor* himself without any Judge; and upon that Case it was resolved, *Quod quisque extraneus, &c.* who brings his Bill upon this *Stat.* to have Restitution, *Debet probari quod tempore captionis fuit, de amicitia Domini Regis*, and also quod ipse qui eum caperis & spoliavit, fuit etiam sub obedientia Regis, vel de amicitia Domini Regis, sive Principis quarentis, tempore spoliationis, & non inimicus Domini Regis, sive Principis, quarentis, quia si fueris inimicus, & sic caperis bona, tunc non fuit spoliatio, nec depredatio, sed legalis captio; prout quilibet inimicus capis super unum & alterum; the Judgement of which Case was held to be Law, and thereupon the Judges delivered their Opinions, that the Morocco Ambassador could not be proceeded against as a Pirat.

Bulstr. 3. pars.  
fol. 28 cited in  
Marshall's Case.

(16.) In the time of *Philippe* the Second of Spain, the *Venetian* Ambassador in *Madrid*, protecting one *Bodavario* a *Venetian* an offender, that fled into his House, and denying the *Corridor* or *Justices* to enter his House, where the Ambassador stood armed to withstand them, upon complaint made, the Ambassador was removed unto another House, untill they had searched and found the offender, then conducting back the Ambassador with all due respect, a Guard was set upon his House to stay the fury of the enraged People; the Ambassador complaining to the King, he remitted it to the *Supream Council*: they justified the proceedings, condemning *Bodavario* to lose his Head, and other the Ambassadors Servants to the *Galleys*, all which the King turned to Banishment, and to satisfy the most *Serene Republique*, sent the whole process to *Inigo de Mendoza* his Ambassador at *Venice*, and declaring by a publique Ordinance unto that *State*, and all other Princes, That in case his Ambassadors should commit any offence unworthily, and disagreeing to their qualities and professions of Ambassadors. they should not enjoy the Priviledge of those Officers, but would refer them to be judged by the Laws of that Prince or State where they then resided, and where they had injured; it was a great and a noble Saying.

(17.) In the Year 1568. *Don Gubernon d'Espes* was ordered to keep his House in *London*, for sending scandalous Letters to the Duke de *Alica* unsealed, and in 1586 *Don Bernardino de*

Sir Henry  
Wooten, fo. 211.  
Nat. Crif.



*Vide* Sir Robert  
Cotton's *pos-*  
*sum*, and the  
Proposition to  
K. Jam.

*Admonitio*; was restrained first, and after commanded away.  
VIII. The manner of proceeding against them, has been conceiv-  
ed necessary to be, that some of the Chief Secretaries of State were  
sent to the Ambassadors, and by way of advice, that understanding  
that the Common People having received notice of, &c. "And that  
"they cannot but conceive a just fear of uncivil carriage towards their  
"Excellencies or their followers, if any the least incitement should  
"arise, and therefore for quiet of the State, and securing of their  
"Persons, they were bound in love and respect to their Excellencies  
"to refrain as well themselves as followers, untill a further course  
"be taken by legal examination, where the aspersions began, the  
"same being in their Opinions the best and the only way to prevent  
"the danger, &c.

Sometimes, if the *Parliament* be sitting, the King acquaints the  
*Lords*, and then departing, who having had Conference with the  
*Commons*, conclude of a *Message* to be sent to the Ambassadors,  
(either by requiring an account of the matter or confining of them)  
the Persons to be sent, the two *Speakers* of both *Houses*, with some  
convenient number of either, having their *Maces*, or *Ensigns* of  
*Offices* born before them to the Ambassadors *Gates*, and then for-  
born; and then requesting speech with them, let them know that a Re-  
lation being made that day in open *Parliament* of, &c. they were de-  
puted from both *Houses*, the *Great Council* of the *Kingdome*, to the  
which by the fundamental Laws of this Nation, the Chief care of the  
Kings safety, and the publique peace and quiet of the Realm is com-  
mitted; and that they were no less the *High Court* of *Justice*, or  
*Supersedes* to all others, for the examining and punishing all at-  
tempts of so high a nature, as, &c. if it carry truth, and having  
executed their Commission, concluded that the *Houses*, to shew  
that Reverence which they bear unto the dignity of his *Master*, by  
their *Message*, they two that never are employed but to the King  
alone, were at that time sent, &c. and if the *Houses* shall upon re-  
turn of their *Speakers* conceive their answer (if it be a matter that re-  
quires it) to be such as may justly deserve their being confined, they  
then make an address to his *Majesty* to confine them to their *Houses*,  
restraining their departure untill the Prince or State, whom they re-  
present, be acquainted with their offence: And so it was done in  
44 H. 3. to the *Popes Legates* in *England*, and 28 E. 1.

The *Parliament*  
not sitting the  
Secretaries of  
State may signi-  
fie the like, if oc-  
casion, &c.

The Opinion of  
the Lord Coke 4.  
Inst. 153. &c.

IX. If a Foreign Ambassador, being a *Prorex*, commits here  
any crime which is *contra Jus Gentium*, as Treason, Felony, Adul-  
tery, or any other crime which is against the Law of Nations,  
he loseth the Privilege and Dignity of an Ambassador, as

unwor-

unworthy of so high a Place, and may be punished here as any other private Alien; and not be remanded to his Sovereign but of courtesie.

X. But if any thing be *malum prohibitum* by any Act of Parliament, private Law or Custome of this Realm, which is not *malum in se Jure Gentium*, nor *contra Jus Gentium*, an Ambassador residing here, shall not be bound by any of them, but otherwise it is of the Subjects of either Kingdome; for if a French Merchant, or Spanish Merchant trades or imports any prohibited Goods, he must at his peril observe the Laws of England; and so it was adjudged, Pasch. 33 Eliz. in the Exchequer, Tomlinson, *qui tam versus Henry de Vale & al.* upon the Stat. of 19 H. 7. Ca. 21. but if an Ambassador imports any prohibited Goods, *contra*.

*In Causis Civil.*

XI. The Office of an Ambassador does not include a procuration private but publique, for the King his Master, not for any several Subject otherwise than as it concerns the King and his publique Ministers, to protect them, and procure their protection in forreign Kingdoms, in the nature of an Office and Negotiation of State; therefore their Quality is to mediate and prosecute for them or any one of them, at the Council Table, which is as it were a Court of State; but when they come to settled Courts, which do and must observe essential forms of proceedings, *scil. processus legitimos*, they must be governed by them: And therefore in the Case of Don Diego Serviento de Acuna, Ambassador Leger for the King of Spain, who libelled in the Admirall Court as Procurator General, for all his Masters Subjects, against one Jolliss and Tucker, and Sir Richard Bingley, for two Ships and their lading of divers kinds, of the Goods of the Subjects of the King of Spain generally, and not naming of them adduct ad Port de Munster, in the Preface of the Libel generally against them all, and then proceeds and charges them severally thus; That Jolliss and Tucker Captain Pyrate, in alto Mare Bellico dictas Naves aggressi sunt, & per vim & violentiam, took them, and that they were adducta in partes Hibernia, and that they came to the hands of Sir Richard Bingley, and he converted them to his own use; (not saying where) and refuseth to render them being required, it was there held, that a Prohibition should go, for the matter is tryable merely at the Common Law, and that such a Procuration was not good.

Hobart. fol. 71.

Don Alonso de Valesco Ambassador from the Catholique King, attached Tobaccos at Land here,, which one Corvero, a Subject

to the King of Spain brought hither, and the Ambassador by his Libel supposed to belong to his Master, as Goods confiscated, as all others his Goods were. Sir John Watts the Plaintiff in the suggestion, pray'd a *Prohibition*, which was granted accordingly, for the property of Goods here at Land must be tryed by the *Common Law*, however the property be guided; and it was likewise rul'd, that if any Subject of a Foreign Prince bring Goods into this Kingdom, though they were confiscate before, the property shall not be questioned but at the *Common Law*. *Don Alphonso vers. Cervero Mich. 9. Jac. Hob. 212. Hill. 9. Jac.* upon the like Libel by *Don Pedro Sureza* Ambassador for Spain.

\* *Distingui sermo hac in re solent crimine. Vi. de Paritum lib. 10. n. i Rex Gallia hanc ob causam iratus pacatur. Vide eundem lib. 11.*

† *Grot. de jure Belli ac Pacis lib. 18. § 4-5. 6. 7.*

*Rex sacrisse metu regium nuntium populi Romani Quiritum vasa commisitque meos: Yet an Ejectment hath been brought and left at the house of the Ambassador, and it was allowed good, and conceived no breach of their Privilege in the Case of Monsieur Cel-*

*bers, for York House Mich. 28. Car. 2. in Banc. Reg. † Grot. de jure Belli ac Pacis, lib. 2. cap. 18. Co. Inst. 4. 153. Certain it is, that none dareth presume to meddle either with their Persons, Goods or Servants, without leave had, the contempt of which has been punish'd with imprisonment.*

XII. Whether an Ambassador hath Jurisdiction over his own Family, and whether his House be a *Sanctuary* \* for all that fly into it, depends upon the concession of him with whom he resides, for this belongs not to the Law of Nations †; and it hath been seen that an Ambassador hath inflicted punishment on his own Servants and Vassals, as the *Muscovite* did here in England; but for Fugitives that fly into their Houses, nay, their own Servants, if they have greatly offended, cannot be drawn forth by force, without a demand and refusal; which when done, it is then become as an offence in them.

XIII. Most certain by the *Civil Law*, the moveable Goods of an Ambassador, which are accounted an accession to his Person, cannot be seized on, neither as a pledge, nor for payment of a debt, nor by Order or Execution of Judgements, no nor by the King or States leave where he resides; (as some conceive) for all coercion ought to be far from an Ambassador, as well that which toucheth his necessities as his Person, that he may have full security; if therefore he hath contracted any debt, he is to be call'd upon kindly, and if he refuses, then *Letters of Request* are to go to his Master; † so that at last, that course may be taken with him as with Debtors in another Territory; to some this may seem hard, yet Kings, who cannot be compelled; want not Creditors; but the Lord Coke seems to be of another Opinion, \* for as to Contracts and Debts that be good *Jure Gentium*, he must answer here.

XIV. If an Ambassador commits any private *Outrage* against one of the Princes Subjects, with whom he resides, unless it be to defend

defend the Dignity of his Charge, or of his Master, it has been conceived by some not to be justifiable before the Prince with whom he resides; for, say they, there is a great difference between the *Dignity* and *Authority* of the Prince in the Countrey of another Sovereign; for, say they, he may well retain his *Dignity*, but not his *Authority*: usually injuries of that nature being done, they have admitted debates at a *Council of State*, where the Sovereign, with whom the Minister of State hath resided being satisfied, that reparation ought to be made to the party injured, he hath been ordered, or at least requested; to comply with the same.

XV. But on the other hand, if any private *Outrage* be committed by the Subjects of that Prince with whom he resides upon his Person, the offenders may be subjected to punishment: And the Queen of *Sweden* having made the *Incomparable Grotius* (after he had escaped by Providence out of Prison; and by a greater from his *Country-man*) her Ambassador for that Crown with *Lewin* the 13th, with whom he resided at *Paris*, coming one day from *St. Germans*, the *Secretary of Ceremonies* being in the Coach with him, it chanced that in one place as they passed, a great number of People were in the way seeing of an Execution, his *Postillion* and *Coach-man* driving boldly through the company, the *Archers* then attending the Execution with short pieces, (concerned somewhat angrily that the Execution was disturbed) made after the Coach, shot his *Postillion* and *Coach-man*, and through the Coach, even through his hat: the matter coming to be examined, the King ordered three or four of them to be hanged, but that *Good Man* first pardoned them himself, and then obtained Kings.

*Barkstead in  
memor. Grotii.*

XVI. The Republique of *Venice* employeth generally more Ambassadors abroad than any other State, and they are as other Princes be, *Ordinary* and *Extraordinary*, the Commission of the Ordinary continueth for three years, but he which resides at *Constantinople* is not call'd Ambassador, but *Bailio*, residing there perpetually; and that Republique allows him a greater provision to support his *Grandeur*, than to any other; and by the Laws of *Venice* whatsoever he expends is allowed him upon his accounts, without any examination; the which no other of their publique Ministers of State have like privilege.

By the Laws of *Venice* there can be no Extraordinary Ambassador employ'd; unless they have been Ambassadors formerly, and upon their return are strictly examined of their comportment in their Legation, and are to discover † what Presents they have received from the Prince or State to whom they are sent, the concealment of which is of a dangerous consequence

† *Bodinus de  
Republ. lib. 3.*

Nor

\* *Jac. Aug. T. uannus lib. 27. In Vita Augustini Barbado Duke of Venice, An. 1486.*

Nor may any of their Ambassadors receive any preferment \* from any other State during their Legation: The *Patriarch of Aquileia* dyed, and *Hermolao Barbaio* being there Ambassador for that *Republique*, the *Pope* conferred on him that *Ecclesiastical Dignity*, and made him a *Cardinal*, which being known at *Venice*, notwithstanding he was a Person of great desert, and had given notice to the *Senate*, rich, well allied, and had good Friends, they sent express command that he should resign the *Patriarchship*, otherwise they would take from his *Father* the *Procuratorship* of *St Mark*, and confiscate all his Estate.

*Paulus Paruta in Hist. Venice, lib. 7.*

But if such Ambassadors have received any Present, Gift or Reward from any Forraign Prince or Republique, and such Ministers of State are thought worthy of retaining the same, such a Grace must palls by the suffrage of the *Senate*, to oblige them more to the benevolence of the Republique, than to the bounty of any Forraign Prince.

## CHAP. XII.

### Of the Right of delivering Persons fled for Protection.

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| <p>I. Where Superiours may become culpable for the Crimes of their Subjects.</p> <p>II. Of punishment, in whom lodged, and where offences to another Prince seem to be excepted.</p> <p>III. What is meant by the words delivering up, and how construed in divers Countries.</p> <p>IV. To what Crimes it can extend.</p> | <p>V. Such Persons have been refused to be delivered up, and on what reason deny'd.</p> <p>VI. Admitting not compellable, whether he ought voluntary.</p> <p>VII. Of Persons running away with the Revenue, whether to be delivered up by the Persons into whose Countrey they fled.</p> |
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*Zeno* interceding for the *Magnets* to *T. Quintus*, and the Legates with him besought them with tears; *ne minus amentiam civitati assignarent, ius quomque periculo facere*, *Livy lib. 40.*

I. **F**athers are not bound for the fault of, their Children, nor Masters for those of their Servants; nor Princes for the Actions of their Subjects, unless they become partakers in the crime; the which may be done in two respects, by sufferance and receipt; therefore if Princes shall suffer their Subjects by Pictures or Libells to abuse another Nation or *Common-Wealth*, it is the same as if they should Authorize it. *Brutus* to *Cicero*, How can you make me guilty? Yes, well enough, if it were in you to hinder it; but receipt may admit of some further scrutiny.

II. *Common-Wealths* being Instituted, it was agreed, that faults of particulars, which do properly belong to their own Society, should be left to themselves and their Sovereigns to be punish't or connived at, as they judged most fit.

Yet



Yet that *Right* is not so absolutely left to them, but Offences, which tend to the destruction of Society or Government, whereof Treason is the chiefest, may seem to be excepted; for if a Subject shall commit an act, tending to the subversion of his Sovereign's Government, the same is an offence that's subject to an universal punishment, i. e. it is to be punished every where, and the Governours into whose Territory such fly, seem to have a Right of prosecuting for the offence: in civil actions, which tend to Commerce that supports Society, the Subject of foreign Princes for Debts contracted in their own Countrey, may obtain justice in another; by a stronger reason it is thought that Princes or Republicques that have received publique injuries, have right to require punishment for the indignity that is offered them, at least for that which tended to the subversion of their Governments.

III. The question is illustrious, Opinions grounded on several great Presidents have been both wayes produced, generally it hath been held that those Kingdoms where the Offenders are fled, ought to do one of the two, either punish them according to their delicts being called upon; or leave them to the Judgement of the offended State, others the contrary; most certain it is by the *delivering up*, is understood, to leave him to the legal Judgement of that Prince or State, whom he hath offended: And such was the Declaration of *Ferdinando* King of *Spain*, who had been often requested by *Henry* the Seventh to deliver up *Edmund de la Poole* Earl of *Suffolk* his Subject; then fled for protection to that Prince's Countrey, but was always refused; but being continually importuned by promises that he should not be put to death, caused the Earl to be delivered up to him who kept him in prison, and construing his promise to be personal to himself, commanded his Son *Henry* after his decease to execute him, who in the fifth Year of his Reign upon cold blood performed the same: But the malice of that Politique Prince the Father, and the uncontrollable Will of the Son are Presidents but of small force; the example of which not long after gave the *French King* occasion to beware of trusting the latter with a Subject of his on the like occasion, for *Cardinal Poole* not many years after, coming Ambassador from the Pope to the *French King*, they both being then in Amity, and *Henry* the Eighth in League with the latter, but in Enmity with the first, requested to have the *Cardinal* delivered up, but could not prevail, being doubly armed, as the Ambassador of a Sovereign Prince (for such is the Pope) and in the Territory of a Foreign State.

For the knowledge of the cause ought to precede the decision; non decess bonorum delicta causa non cognita. Plutarch in his *Romulus*.

Attainted by Act of Parliament, 12 H. 7. Co. Inst. fol. 180.

5 H. 8. Vide Lord Herbert's Hist. of Henry the Eighth.

Pipin receiv'd and would not deliver up those that fled to him out of *Newstrin*, oppress by Tyranny. *Fredegar. in Reb. Pop. An.* 1188.

The *Israelites* require of the *Beniamites* to deliver up the wicked Men, the *Philistines* *Samson*; *Caro* gave his vote that *Cæsar* should be delivered to the *Germans*, for spoiling them without just cause; nor are nocent Persons injured, if they are either deliver'd up, or punished; yet does it not thence follow that they must be delivered up or punished: the *Romans* delivered up those that had done violence to the *Carthaginian* Ambassadors.

IV. But then, and as in this last, so in all other the offender must have committed some publique offence, \* as Treason; for most certain it extends not to private injuries, because there is no President that ever a War was begun for such, though they may contribute much; but for those which tend to the subversion or ruine of a Countrey, they often have been delivered up; *Jugurtha* of *Bocchus* in *Salust*. So shalt thou at once free us from the sad necessity of prosecuting thee for thy Error, and him for his Treason. And by most Writers it is agreed, that such Offenders must either be delivered up or punish'd, the election is left to their choice, into whose Territory they are fled; though some have held, that in case of protection † the Sanctuary for such unfortunate Persons, Princes do make their Countrey an *Asylum*.

\* Yet out of Churches beyond Seas for private offences, which are universal Sanctuaries, the offenders have been taken in *Lusitania*. *Ferdinand* L. Chamberlain was taken by force out of the Church and burnt, for forcing a Noble Virgin, *Mariana* lib. 11. *Charles* Duke of *Burgundy* delivered up to *Lenin* the 11. the Earl of *St. Paul*, Constable of *France*, who flying to some of his own Cities, obtained Letters of Safe-Conduct to come and commune with the Duke, in order to the making his peace with the King, but the Duke after he had him in custody, delivered him to the King of *France*, who immediately after cut off his head, *Phil. Comines* lib. 4. c. 12. † *Ludovicus* Pius the Emperour, received those that fled to him from the *Roman* Church, as appears by his Decree Anno 817: and *Luther* himself did not want Princes to protect him from the fury of *Saint Peter's* Chair. Vide his *Colloquium* printed in *London*, Anno 1643.

T. *Quintus Flaminius*, sent Ambassadors to *Prusias* King of *Bithynia*, for the procuring the delivering up the brave but unfortunate *Hannibal*, who accordingly being seized on, I will now, sayes he, deliver the Romans of that fear which hath so many Years possess them; that fear which makes them impatient to attend the death of an old Man: This Victory of *Flaminius* over me, which am disarm'd and betray'd into his hands, shall never be numbred among the rest of his Heroical deeds: No, it shall make it manifest to all the Nations of the world, how far the Ancient Roman Virtue is degenerate and corrupted; for such was the Nobleness of their Fore-Fathers, as when *Pyrrichus* invaded them in Italy, and was ready to give them Battell at their own doors, they gave him knowledge of the Treason intended against him, by Poison, whereas those of a latter

Rac,

Livy. Vid. Sir Walter Raleigh lib. 5. cap. 6. §. 2.

Race have imply'd Flaminius, a Man who hath heretofore been of their Confide, in practise with Prusias, contrary to the Honour of a King, contrary to his Faith given, and contrary to the Laws of Hospitality, to slaugter or deliver up his own guest.

V. What ever the Opinion of those Writers have been, the practice of latter Ages have seemed to incline otherwise. Queen Elizabeth demanded Morgan and others of her Subjects fled into France, that had committed Treason against her; the answer of the French King was, *Si quid in Gallia machinamur, Regem ex jure in illos animadvertendum; sed in Anglia quid machinati fuerint, Regem non posse de eisdem cognoscere, & ex jure agere; omnia Regna profugia esse libera. Regum interesse, ut sui quisque Regni libertates tueatur; ideo Elizabetham non ira pridem, in suum Regnum Mountgumerium, Principem Condeum, & alios a Gente Gallica admissos, &c.* And they were never delivered up: But the like was not returned by the King of Scotland, for he promised that he would transmit *Fernihurst* and the Chancellor too, if they were convicted by a fair Tryal; the Cry of the late ROYAL MARTYR's Blood justly procured some of those Regicides to be delivered up by them of Holland.

VI. Most certain it is, if War be threatened to a Nation or People, if they deliver not up the Offender, though perhaps he is innocent, and that such is the malice of his enemies that they know they will put him to death, yet he may be deserted; especially if that Nation or Kingdom is inferior to the others, but then the same ought not to be done rashly. The *Indian* Foot that forsook the unfortunate *Pompey*, before all was lost, being assured of Quarter from the Victorious *Cesar*, were condemned by most that reported the Story of that day.

*Pope Alexander* (in that mortal Feude between him and the Emperor *Frederick*, who favoured *Ottavian* the *Antipope*) fled disguised to *Venice*, the Duke and Senate being jealous that the Emperor would demand him, sent an Ambassy to the Emperor to endeavour a Mediation and Peace, which was no sooner offered, but the Emperor broke forth into a Rage, bidding them go home, saying, 'Tell your Prince and People, that *Frederick* the Roman Emperor demands his Enemy, who is come to them for succour; whom if they send not presently bound hand and foot with a sure Guard, he will proclaim them Enemies to him and the whole Empire, and that there is neither Alliance or Law of Nations which shall be able to free them from revenge for such an injury, to procure which, he is resolved to overturn all Divine and Humane

34 Elizabetha  
Cambd. fol. 39.

Vide Cambd.  
Anno 1585.

Anno 1660.

That politick  
Princes gavethe  
Scots a more e-  
quitable answer,  
when they de-  
manded Both-  
well, she answer-  
ed, that she  
would either  
render him up,  
or send him out  
of England.  
Cambden Anno  
1593.

'Laws, that he will suddenly bring his Forces before their City, and contrary to their expectation, plants his *Vindicator Eagles* on the Market-place of *St Mark*. This Message being faithfully delivered, the *Senate* decreed *Arms, Arms*; and while they were preparing, news was brought that *Otho*, the Emperour's Son and General of the *Cassian Fleet*, was entered the *Gulph* with seventy five Gallies; the most valiant and religious *Tebastian Cyani* resolved to meet him, and having encountered them on the Coast of *Ischia*, defeated *Otho* and all his Naval Forces, taking forty eight Gallies, *Otho* their *Admiral* and the rest either burnt or destroyed; he returned in triumph for *Venice*, and not long after *Frederick* became converted, that *Heaven* fights the Battels for the Innocent, and on his knees begg'd pardon of the *Pope*.

*Learn* the 11th of *France*, required by Ambassadors of *Philip* Duke of *Burgundy*, the delivery up of *Sir Oliver de la Marche*; who being a *Burgundian*, had wrot (as was conceiv'd) somewhat against the claim of the *French* to several Territories, upon a publique Audience at *Lisle* they were answered by Duke *Philip*, That *Oliver* was *Steward* of his House, a *Burgundian* by birth; and in no respect Subject to the Crown of *France*; notwithstanding if it could be proved that he had said or done any thing against the Kings Honour, he would see him punished according as his Faults should deserve.

But admitting that such an Innocent Person ought not to be delivered up; whether he is bound to yield himself, by some it is conceiv'd he ought not, because the nature of Civil Societies, which every one hath entered into for his own benefit, doth not require it, from which it follows that such Persons are not bound to that by Right, properly so called; yet it doth not follow, but in Charity he seems bound to do it, for there be many offices not of proper Justice, but of Love, which are not only performed with praises, but also cannot be omitted without blame; and such indeed is the act of such a Persons voluntary yielding up himself, preferring the lives of an innocent multitude before his own. *Cicero* for *P. Sestius*. If this had happened to me sailing with my Friends in some Ship, that Pirates surrounding us should threaten to sink us, except they would deliver me, I would rather have cast myself into the Sea, to preserve the rest, than to bring my Friends either to certain death, or into great danger of their life: The Request of the Noble *Strafford* is fresh in our memories.

*Hist. Rep. Ven. in Vita Tebastiani Cyani Duke of Venice An. 1164.*

*Phil. Comines lib. 1. cap. 1.*

*Idem de finibus 3. Vir bonus & sapiens. & Legibus parvis, & civilis officii non ignarus, utilitatem omnium plus quam sui adversus aut sua consilio. And in*

*Livy* there is a most excellent saying of some *Molossians*, *Equidem pro Patria qui lethum oppatisse non saps fundo audire: qui Patriam pro se perire aequum consensit, hi primi inventi sunt* *Livy lib. 45.*

VII. But

VII. But whether such an Innocent Person may be compelled to do that which perhaps he is bound to do; may be a question; Rich Men are bound by the precept of Mercy to give Alms to the Poor; yet cannot be compelled to give: It is one thing when the parts are compared among themselves; another when Superiours are compared to their Subjects, for an equal cannot compel his equal, but unto that which is due by right strictly taken; yet may a Superiour compel his Inferiour to things which vertue commands; in a Famine to bring out provisions they have stored up, to yield him † to death that deserts his Colours; or turns coward, to mulct those that wear excessive apparel, \* and the like. Phocion, pointing to his dear Friend Nicocles, said, *Things were come to that extremity, that if Alexander should demand him, he should think he were to be delivered up; It hath seem'd that such an Inno-*

† Leg. Desert.

\* Co. Inst. 3. fol.

199.

Plutarch Pho-

on. Fides agi-

visa de istis non

prodi. Livy lib. 7.

*Satis judicemus esse paucos aliquos mala ferre: quam immensam multitudinem.*

cent Person might be deserted and compelled to do that which Charity requires; but the late ROYAL MARTYR seem'd of another Opinion, when he came to dye, in the case of the *British Protest-martyr Sirafford*.

*Henry and Augustus*, about the *Empire of the World*; this Pompey entertaining *Anthony and Augustus* in his Gally, the Captain which commanded it, demanded leave of him to weigh Anchor, and to carry away his Guests, and to make prisoners of his Rivals: he answered him, that he ought to have dooe it without telling him of it, and should have made him great; without having made him forsworn: Certainly, an honest Person will never be of the mind of this Captain; therefore in such extremities, *Councillors* either for high advantages, or in the great necessities of their *Princes*, should serve their Masters with their Estates and Goods, but not with their Honour and Conscience.

VIII. Persons that have wrong'd or defrauded Kings of their Revenue, especially in *England*, upon Letters of Request to those Princes whither they have fled, have been delivered up.

Some *Florentine* Merchants of the Society of the *Stricobaldi*, being made Collectors and Receivers of the Kings Customs and Rents in *England, Wales, Ireland and Gascoigne*, running away with those Moneys, together with all their Estates and Goods for *Rome*, the King sent his Letters of Request to the *Pope*, desiring that they might be arrested, their Persons and Goods, and sent over to satisfy him the damages he and his Subjects had sustained by them, promising not to proceed against them to the loss of their limbs and lives. Upon which Letters the *Pope* seized on their Goods, and not long after the Kings Writ for the seizing of their Persons, for answering of other frauds and injuries.

Ref. Roma An. 4

E. 2. M. 17. Der-

ps.

Ref. Roma 4

E. 2. M. 16. 40-

Derps.



The like was done for one *Anthony Razons*, who had received five thousand pounds of this Kings Moneys, and running away with it to *Lorraine*, the King writ to the same *Duke*, desiring that search might be made, and his Person seized upon in every place within his Territories, till he should satisfy the said five thousand pounds.

### CHAP. XIII.

#### Of Contribution pay'd by Places Neuter, to both Armies in War.

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| <p>I. Considerations general, touching the same, and the chief matters that are objected by those that oppose them.</p> <p>II. The case stated generally in the question propounded to our Saviour of paying Tribute to Caesar.</p> <p>III. In the payment of Contribution to an Enemy, what is necessary to be distinguished in the beginning of a War.</p> <p>IV. Of a second distinguishment drawn out of the first, of such payments, when a War is actually formed.</p> <p>V. Where a Man pays, but mistakes the cause, whether excusable, the War not yet actually formed in the place.</p> <p>VI. Where a Countrey is fully possess'd, whether payment then is lawful.</p> | <p>VII. Of the State of those that live on Frontiers, their condition considered as in reference to procure their peace by Contributions.</p> <p>VIII. Of interdiction by him to places from whom Faith is owing. Contribution notwithstanding being pay'd, whether the same creates an offence in them.</p> <p>IX. Of the genuine construction of such interdictions according to the true intention of the same.</p> <p>X. Of the impunity and punishment that such innocent offenders may be subjected, in case of being questioned for the contempt by their right Government.</p> |
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I. The most Excellent *Grotius* having most incomparably treated on, and cleared all the important objections against a Just War, together with the incidents of the same, yet this one main of Contribution or paying to both Armies, whether lawful, he has not touched in any other words but these, *Quod sub tributo: utrique parti prestando factum diu in Belgio, Germanico, bello nuper vidimus; et si quid consentaneum mori veteri Indorum: et* and so cites a saying in *Diodorus Siculus*, \* of the Peace that those People maintained in their possessions by reason of such Contributions, but to many Persons that instance of this without further scrutinizing, proves insufficient; for that there are many who not finding this liberty in their Consciences, unnecessarily chool rather to give up their Bodies to restraint, and to abandon their whole means of subsistence in this World, both for themselves and their Children, (which ought not fondly to be done, unless we would be worse than Infidels, as *St. Paul* saith) they ground their resolution on this reason, that they know

\* *Grot. de Jure Belli ac Pacis lib. 3. cap. 12. §. 4. n. 2. \* Lib. 2.*

know not whether the Monies they give may not furnish to the destruction of many Innocents, and perhaps the Just Magistrate; yea, and the total subversion and ruine of their Countrey, Liberty and Religion: and therefore though Men give and bestow what they please with their own, yet in such cases they may not; therefore it may not be impertinent for to examine whether these be necessary scruples in themselves, and such as admit of no exception of liberty, or whether those scruples be reasonable, or indeed meer scandal.

II. The *Scribes* and *Pharisees* sought two wayes to entrap *Our Saviour*; one was as if he had blasphemously taught a new Religion, and a new God, (*viz.* himself) they hoped the People would be provoked to stone him for this, according to the *Hebrew Law*: \* The other was, to bring him within the compass of *Treason*: as if he could not lead great Multitudes after him, without trayterous designs; but this gin failed too, because the Multitude which followed him, was alwayes ready to defend him. However, when he was at *Hierusalem*, where the *Roman Troops* and *Prætor* were, they thought they had him sure; by propounding this subject to him:

\* *Dist. 17.*

*Is it lawful to pay Tribute to Caesar?* which was as much as to say, We, who are descended from *Abraham*, and are the peculiar People, to whom God hath given the large Privileges of the Earth at home, to bath our selves in Rivers of Milk and Honey, to have full Barns and many Children; yea, that GOD himself will be adored in no other place of the World but at this our *Hierusalem*, and that abroad we should triumph over the *Barbarous* and uncircumcised World by virtue of that *Mithra*, which he never ordered for any but our selves; how are we then in duty or conscience to submit now to the Ordinances of the *Uncircumcised Romans*? or what right can he have to exercise Supream Jurisdiction over us, the privileged *Seed of Abraham*, by levying of taxes on our Estates and Lands, which GOD himself laid out for us, by which means the *Emperour* and *Senate* hold this very Temple in slavery, and insult over our very Consciences and Religion, by defiling our very Sacrifices with the mixture of impure Blood; which as they are the price of our Blood, and a Tribute far above *Cæsars*, (payable in no other place but this Temple, which GOD himself built) so our Blood ought not to seem too dear to be sacrificed for the liberty of these; and though the *Roman State* could pretend, yet what can this *Cæsar* pretend? Every Man's Conscience knows that it was but the other day he usurpt over the *Senate*, in which resides the true Jurisdiction of *Rome*; and if that were otherwise, yet how can he pretend to a Title, unless poyson be a pedigree, or violent usurpation a just Ele-

Election, by which he who is but the greatest Thief in the World, would now pass for the most Sovereign and Legislative Prince? How then are we in conscience obliged to pay Tribute to this *Cæsar*? Though those Lawyers thought in their Consciences that they were not to pay it, and that *Our Saviour* likewise, as *Jew*, thought so too; yet they supposed he durst not say so much in the crowd; nor yet deny it by shifting it off with silence, lest the *Roman Officers* should apprehend him: But when *Our Saviour* shewed them *Cæsar's* Face upon the Coyn, and bad them *Render to Cæsar that which was Cæsar's, and to G O D that which was G O D's*: His answer ran quite otherwise, not as some would have it, that by a subtilty he answered not to the point proposed, for then the sense of the whole Text would sound very ill in such terms, *viz.* If there be any thing due to *Cæsar*, pay him it, and if any thing is due from you to *G O D*, they pay it likewise. This had been a weakening of *G O D's* Right for *Cæsars*, and to have left a desperate doubting in a necessity: 'Tis beyond all cavil, that *Our Saviours* Opinion was positive for paying of Tribute to that *Cæsar*; because *de facto* he did pay it, and the plain reason of it appears evidently in this his Answer: *Cæsar's* Face was upon the Coyn, that is to say, *Cæsar* by Conquest was in possession of that Coyn, by possessing the place where he obliged them to take it; Coynage of Money being one prerogative of Sovereign

Matth. 22. 20.

† Coke 3. Inst.  
fol. 16, 17.

III. But to come more close to the question, whether Contribution may lawfully be pay'd, *perferre & inferre bellum*; the one is active, and properly at the beginning of a War, and in a place where yet no War is, and where its cause only, and not its effects can be considered; in this case every thing ought to be very clear for warrant of a Man's Conscience, because of the calamities which he helps to introduce, and is in some manner the Author of, the other is Passive, and there where War or the power of War is actually formed, which is the case of this discourse.

IV. Secondly, we are to distinguish betwixt that which cannot be had, nor the value of it, unless we actually give it, and that which may be taken by the Law of War whether we contribute yea or no.

V. Most certain it is, though a War be not yet actually formed in a place, yet a scrupling conscience, which likes not the cause, may be excused in contributing to it in this one case, *viz.* if some number of Men able to take what they ask, demand (with an armed power) the payment of a certain summe to be employed in War, then in such a case, the Man, whom we suppose, may pay it as

it as a ranfome for his life, or give it as a Man doth his purfe, when he is furprifed \* in the High-way; becaufe to this Man it is as much as if the whole Countrey were poffefft with an armed power: So feveral *Duchies* and *Seignories* dependant on the *Empire*, do in the prefent War between them and the *Crown of France*, pay Contribution at this day.

But if the Perfon or Countrey be not for the time in the full poffeffion of him, whole caufe he fcruples at, and that he or they have not a probable fear of extream danger, nor as probable affurance that without his help, the thing demanded, nor its value can be taken from him or them, then there's little excufe remains for the act, becaufe the very act (which his confcience diflikes) participates more of action than of paffion.

V I. But where a Man or City is fully poffefft by an invading power (be the fame juft or unjuft) from whom he or they cannot fly, nor remove their fubftance; moft certain the payment of Contribution is no gift, no more than he, (as above) who with his own hands, being fet upon by Pirats or Robbers, puts his purfe into their hands; for the Law calls not that a gift, † nor excufes the party from taking it: And though the parties may employ the fame to the de- ftruction perhaps of Innocents, and the like; yet that is an action out of their power, that give as far as winds and tempefts are, to which two, as we contribute nothing, fo we cannot be fcrupulous in our Confciences concerning their bad effects; nor is the fame repugnant to the *Canon Law* \*, (which teaches us humanity, and the imitation of all their virtues,) and therefore perfons, whole lives are innocent and harmlefs, will not have fubjected to danger or plunder, which hardly can be avoided without Contribution or Tribute.

VII. Again, thofe that live on Frontiers, whole conditions are more ticklifh and deplorable, becaufe they are not fully poffefft, nor taken into the Line of either party, thefe live as it were in the Suburbs of a Kingdom, and enjoy not the fecurity or privileges of others, yet fuch Perfons may lawfully contribute to both, for though they be but partly poffefft by one, and by the other, in refpect of their fuddain abandoning them, yet both Parties have the power of deftroying them wholly, wherefore thofe former reafons which juftifie thofe fully poffefft, do alfo acquit the payments of thefe, for their condition here is more calamitous, feeing they are really but tenants at will, expofed to a perpetual alarm, and that both parties wound one the other, only through their fides, as thofe this day that are fcituate between *France* and *Germany*, for being perhaps Neuters in the War, they are in that

\* 4 H. 4. 2.  
Procopius in the third of Goth. of Iptilas, when he befieged Rome, faith Agri- colis interim per omnem Italiam nihil mali intulit, fed juffit eis ita, ut politi erant, terram perpetuo fecuros colere, modo ad ipsum Tributa perferrant: This, faith Caffiodore, is the greateft praife, 12. 15.

† 44. E. 3. 14.  
4 H. 4. 3.  
Co. 3. Inft. f. 68.

\* C. 2. de Treng.  
& Pace. Nic.  
Damafc.

† *Exemplum no-  
bile vide apud  
Rautem lib. 8  
Grotius lib. 3.  
c. p. 17.*

case by the Law of Arms to shew themselves equal to both, † in permitting of passage, in affording provisions for the Armies, in not relieving the besieged.

VIII. Nor can the interdiction of him, to whom such owe Faith and Obedience, any wayes create the same an offence, since the declared wills of our Governours cannot make all those of our acts sins, when we obey or submit to that power, which is against our wills, (as much as against theirs, and it may be with more of our misery) hath divested them of the power of their Rights, and deprived us of the power of their Government; and by the Laws of War, they who have overcome, should Govern those whom they have overcome; and therefore whatsoever is exacted by the Conquerours, may justly be pay'd by the Conquered. \*

\* *Grotius de  
Jure Belli ac Pa-  
cis lib. 3. cap. 8.*

And since Princes by their commands cannot change the nature of humane condition, which is subject naturally to those fore-mentioned changes; it would seem exceeding hard to oblige us to almost moral impossibilities; and though those Political Commands were as Laws, yet doubtless they ought not to be obliging, but according to the Legislative rule, which is *cum sensu humana imbecillitate*, this is that which usually is call'd the presumptuous will † of a Governour, or the mind of a Law: for in extream necessity it is to be presumed, that both their Wills proceed from the rigour of what they have declared, rather than by holding to that which is their supposed Right, introduce certain miseries and confusion: without receiving any benefit thereby to themselves. Nor could they of *Utrecht*, and others of the Conquered Cities in *Holland*, abandoned afterwards by the *French*, entirely preserved from destruction, be condemned by their *Confederates*, for the summs by them promised to the Enemy for the preservation of the same.

*Jure hoc evenit  
ut quod quisque  
obtuselam corpo-  
ris sui, jure secisse  
existimeretur.*

† *Leg. ut vim.  
D. de just. & jur.*

\* And that is apparently convinced, by the Laws of Leagues; for such being made, the same remains, although the same King, or his successor be driven out of his Kingdom, for the right of the Kingdom remains although he hath lost the possession.

*Grot. de Jure  
Belli ac Pacis.  
lib. 2. c. 17 §. 19.*

Neither are such Commands or Interdictions without their sense and profit: though they be not positively obeyed, \* for thereby Governours shew to all the world, that they renounce no part of their Right, no, though it be there where they cannot exercise any part of their just power.

IX. Now the true intentions of such Commands or Interdictions is, that the Enemy should not by any means be assisted or strengthened; but if such prohibitions should be obeyed; nay at such a time, when they and all their substance are absolutely possessed by the Enemy; most certain such commands dash against themselves, and the one countermands the other; for if they refuse to submit in such a case, then they do that which advantages their Enemies: Because at that time they will take all, whereas in case of submission they ask but a part.



X. In all Wars there are alwaies some, by whose disaffections, Enemies gain more than by their compliance, just as Physicians do by distempers.

And although, by after variety of successes, the Just Governour should recover that place, which so submitted to the power of their Enemies, and for that reason should punish those that were pliable to extream necessity; yet it follows not upon that, that they who so conformed, sinned, or did that which was absolutely unlawful; for we well know that reason of State oft calls for Sacrifices, where there is no fault to expiate: *Ostracisme* and *Jealousie* make away those who are known to deserve most, but in strict right (which is the term of this question) the Just Governour ought to look upon them as more unfortunate than faulty.

*In Republica  
idem est minimum,  
& nihil morari.*

## CHAP. XIV.

### Of the Naval Military part.

- I. The advantage that Princes have by a good Commander.
- II. The Love that naturally proceeds from the Mariners to those that are valiant and generous.
- III. Princes in prudence ought not to listen too much to the complaints against Commanders.
- IV. Of the faults generally considered in Souldiers and Mariners.
- V. Of the punishments that generally wait on such offenders.
- VI. Of Drunkenness, Swearing, and other such sort of impieties, not to be suffered in Fleets.
- VII. Spies, if lawfull to use them by the Laws of Nations, but being apprehended are to suffer death; and how they are to be dealt withal by the Laws of England.
- VIII. It is not lawfull for a Friend or Neuter to relieve an Enemy, and Persons so offending, how punished.
- IX. Ships taken as prize, the Ship Papers, and other matters concerning the same, are to be preserved.
- X. Of things taken and acquired in War, how the right of them becomes vested in the Captors, and how that is to be understood by the Law of Arms.
- XI. To steal the Cables or other furniture of the King of England's Ships, how punishable at this day.
- XII. Ships surrendered and voluntarily surrendered, how to be dealt with, and whether to those that shall resist it, if entered by force, quarter may be refused.
- XIII. Ships of War generally ought not to be yielded, but if entered or disabled, whether they may not accept of quarter, standing with the Oath called Sacramentum Militare.
- XIV. Of obeying Orders, the same ought punctually to be followed; and if broken, though the Act succeeds well, whether the same subjects not the Actor to punishment.
- XV. Of the obligation incumbent on Commanders and Souldiers to behave themselves valiantly, and the rights of slaying an Enemy, where lawfull.
- XVI. Ships how obliged by the Law of Arms for the assistance of one another, and of the duty of those that have Fleets under their Convey.
- XVII. An Enemy beaten ought to be

- pursued, and how for it is lawful to slay such flying with their lives in their hands by the Laws of Arms, and how the reeking sword ought to be governed.*
- XVIII. *Persons exempted from the Sword, by the Laws of Nature, Nations, Civil and Canon, and by the Municipal Laws of some Countries.*
- XIX. *Mutiny how esteemed, valued and punished at this day by the practice of Armies, and by the Laws of England.*
- XX. *Whether it be lawful to decoy the Subjects, Souldiers, or Mariners of an Enemy, to forsake his Prince or General, and to bring over his Men, Ships, or Arms, and where by Law they may be received; and how such deserters may be punished by the Laws of Nations, and of England.*
- XXI. *Of Seducers, Message Carriers and Decoyers of Souldiers, how to be handled by the Law of Arms.*
- XXII. *Of those that shall disobey or strike their Superiour Officers, how punishable.*
- XXIII. *Of mutiny, and those that shall act in the same how punished, though they have a just cause of complaint.*
- XXIV. *Of the care incumbent on Commanders and Masters of the Great Ships, as in reference to their safety, and the punishment of wilfull burning and destroying them.*
- XXV. *Of the general offences at Sea, how punished.*
- XXVI. *Court Martials how erected, and what operation their Judgements have, and upon whom.*
- XXVII. *Judges, and Advocates Power as in reference to give an Oath, and the Admiral's Power how limited to the punishing of offences.*
- XXVIII. *Of maimed Souldiers and Mariners, and the provisions that the Law makes for them at this day.*
- XXIX. *Of Triumphs.*

I. **A**N Excellent *General* is an evidence of the Fortune of a *Prince*, and the Instrument that occasions the happiness of a Kingdom; and therefore when GOD makes choise of a Person to repair the disorders of the World, or the good of a particular State, then is his care shewed in the furnishing him with necessary Principals to undertake great matters; the thoughts are put in his Soul by that eternal Commander to execute, he troubles and confounds his Enemies, and leads him as by the hand to Victories and Triumphs: And one of the greatest expedients whereof he serves himself for this purpose, is to raise unto him Excellent Men both in Courage and Conduct, to whom he communicates his care, and who help him to bear the weight of Affairs. *Alexander* had never conquered *Asia*, or made the *Indies* to tremble, but for *Ephestion*, *Parmenio* and *Clytus*; *Cesar* gained many a Battel by his Lieutenants, and the fairest Empire of the world, which Ambition and Evil of the Times had divided into three parts, was reduced under the Dominion of *Augustus*, by the valour of *Agrippa*, *Justinian* triumphed over *Persia*, and destroyed the *Vandals* in *Africa*, and the *Goths* in *Italy*, by the aid of *Bellisarius* and *Narcete*: And it is most certain, that *Noble Commanders* are the Glory of their *Princes*, and happiness of the *People*; on the other hand, base, cowardly and treacher-

cherous Generals, are the shame of the one, and the despair of the other.

II. Hence it is, that Souldiers and Mariners draw their Lines, either of love even to the mouth of Canons with a good General, or mutiny and hate to the Main-yard and against one that is bad, for to obey them who are not their Sovereigns when they do them hurt, when they insult and are cruel in cold blood, and base, cowardly, or treacherous in Battel, is a sad necessity for them, and a hard essay of patience; yet must they be obeyed, and the Souldiers and Mariners must not rebel or repine, but submit till the Sovereign redresses the misfortunes.

III. Again, a *Prince* ought not to listen too much to the mutinous demands of the *Crew*, or any others, whose ambition watches their ruine, whereby to conceive anger against his *Commanders*; for it is easier to purge out the choler and discontent that is got under the hatches, than to provide *Commanders of Conduct*, Courage and Faithfulness to govern their Expeditions. *Belisarius*, that most Excellent Commander, who had no other crime than his *Reputation*, and was not culpable, but that he was powerful, having conquered *Persia*, subdued *Africa*, humbled the *Goths* in *Italy*, led Kings in Triumph, and made appear to *Constantinople*, somewhat of *Old Rome*, an *Idea* of the Ancient Splendour of that proud *Republicque*; after all his Eminent Services, this *Great Person* is abandoned to *Envy*, a suspicion ill grounded destroys the value of so many Services, and a simple *jealousie of State* wipes them out of the memory of his *Prince*: but he rests not there, for the demeanor had been too gentle, if cruelty had not been added to ingratitude; they deprive him of all his Honours, they rob him of all his Fortune, they take from him the use of the Day and Light, they put out his Eyes, and reduce him to the company of Rogues, and the miserable *Belisarius* demands a Charity, even that *Belisarius* the Chiefest General of his Age, and the *Greatest Ornament of the Empire*, who after so many Victories and Conquests, accompanied with so high and clear a Virtue, and in the midst of *Christendom*, reduced to so abject and low a misery.

Nor was this cruel and hasty reckoning of *Justinian* let slip, without a cruel payment, for *Narces*, who was as well a Successor in merit as in Authority to *Belisarius*, who having notice of a disdain, conceived likewise against him upon a single complaint, resolved not to expose himself as a Sacrifice to their malice; and therefore better to shake off the yoke than stay to be oppressed, soon spoiled the affairs of *Justinian*, for the *Goths* revolted, and Fortune would

*Procopius Hist. Vandal. in Vita Belis.*

*Vide Sir Walter Raleigh, lib. 5. cap. 6. §. 2. And in that whole Paragr. the ingratitude that hath been shown by Princes to many a Brave and Noble General & Commander, there particularly enumerated.*

not forbear to be of the party, which *Narces* follow'd, nor to find the *Barbarians*, where so brave a Captain was engaged. Therefore, not one or many faults are to be listened to against Commanders, but patiently heard and redressed, but not to disgrace or lose them; for such having committed a fault, yet being admonished by Love, may endeavour by future Services to make recompence by some Noble Exploit; but disgraced, become Instruments often of danger and ruine to their Superiours.

IV. Souldiers and Mariners faults are either proper to themselves, or common with others.

Those are common with others, which other Men fall into, and are corrected with like ordinary proceeding as other crimes of like nature, a Man-slaughter, Theft, Adultery, and such like.

*De Castrensis peculio, & C. de m. l. 12. C. de cognitione militaris annona. & C. de vest. Militari.*

Those are proper which do properly appertain to the *Naval Military* part, and are punished by some unusual or extraordinary punishment: As are these, not to appear at the over musters or calling over the Ship, to serve under him he ought not to serve, to vage or wander long from a Ship-board, although he return of his own accord, to forsake his Fleet, Squadron, Ship, Captain, Commander, or Officer, to leave his standing to fly over to the Enemy, to betray the Fleet, Squadron or Ship, to be disobedient to Superiour Officers, to lose or sell his Arms, or steal another Man's, to be negligent in his Officer's Command, or in his Watch, to make a Mutiny, to fly first out of the Battle, and the like, which are very frequently set forth in the Titles of the *Digest* and *Code* of Military Affairs, and other like Titles which accompany them.

*Arrian*, who wrote the Life of *Alexander the Great*, observes, *Every thing is counted an offence in a Souldier, which is done contrary to the common Discipline*, as to be negligent, to be stubborn, to be slothful.

V. The punishment wherewith Souldiers and Mariners are corrected, are those corporal punishments, or a pecuniary mulct or injunction of some service to be done, or a motion or removing out of their places, and sending away with shame.

By Capital punishment, is understood for the most part Death, or at least bearing with *Cat* with nine tails, as they commonly term it, *Ducking*, *Wooden-horse*, *Gauntlet*, and such like, unless happily it be pardoned, either for the unskillfulness of the Mariner or Souldier, or the mutiny of the *Crew* or Company, being thereto drawn by Wine, Wantonness, or for the commiseration or pity of the Wife and Children of the party offending; all which is left to the discretion of the *Lord Admiral*, and others the Supream Commanders, or Captains.

VI. It

VI. It is necessary that in Armies and Fleets all manner of impiety should be prohibited, especially that of Swearing and Cursing; for such are sins so foolish, that they unawares bring Men into damnation, rendering Men worse than Beasts, by how much the more they court that vanity of sin without any of the appendant allurements, which other vicious actions are accompanied with; the same in the end teaching Men to disavow GOD in their Discourse and Actions, by their intemperate and inconsiderate invoking him in their Oaths: Against such, as also against those that shall give themselves up to Cursing, Execrations, Drunkenness, Uncleaness, or other scandalous actions in derogation of *God's Honour*, and corruption of good manners, Fines and Imprisonment; or such other punishment may be inflicted on them by a *Court-Marshal*, \* which is now reduced to the forfeiture of one days pay; but for Drunkenness, the same extends not to Commanders, or other Commission and Warrant-Officers; for they upon conviction before the *Admiral* shall be rendered incapable of their Command.

13 Car. 2. cap. 9.  
Artic. 2.

\* By Orders of  
His Royal High-  
ness.

And a *Liar* convicted on Ship-board, shall be hoisted upon the Main-stay with four braces, having a Broom and Shovel tyed to his back, where he shall continue an hour, every Man crying, *a Liar, a Liar*, and a week following he shall clean the Ship's Head and Sides without board, according to the ancient practice of the Navy, if he receives greater Wages then for an able Sea-men, than half a day's pay.

Artic. 1.

Artic. 3.

VII. By the *Laws of Nations*, *Spies* may be sent to survey the Enemy's Force, Fleet, Station or Squadron, and make discovery of whatsoever may give advantage to the Persons sending: So *Moses* and *Joshua* did into the *Holy Land*; on the other hand being apprehended, they are to be put to death, as *Apian* saith; and by the *Laws of England*, if any Officer, Souldier or Mariner, in actual Service, and in pay in His Majesties Fleet, or any other Person in the same, shall give, hold, or entertain any intelligence to or with any *King, Prince or State*, being enemy to, or any Person in Rebellion against His Majestie, His Heirs and Successors, without leave or Authority from the King, Admiral, Vice-Admiral, or Officers in chief of any Squadron, they are to suffer death: Now, the bare receipt of a Letter or Message from an Enemy, will not make a Man subject to the penalty of this Article; and therefore the subsequent Article explains the precedent; in which it is provided, that if any inferior Officer, Mariner, or Souldier shall receive any Letter or Message from any King, Foreign Prince, State, or Potentate, being an Enemy, or on their behalf; and if such Person

*Livy lib. 2. cap.  
6. ult. ad Leg.  
Corn. de Sicariis  
pun.*

Stat. 13 Car. 2.  
cap. 9. Artic. 3.



Artic. 4.

Ad Leg. Corn.  
de ficiariis nu.

Tacit. Hist. 5.

Bartol. Leg.  
nullus. Leg. 2. de  
Iudais Coliculis.Procopius Goth.  
1.Stat. 13 Car. 2.  
cap 9. art. 5.

does not reveal the same within twelve hours, having opportunity so to do, and acquaint the Superiour Commander with it; such Person is to suffer death; So likewise, if such Superiour Officer, or Mariner being acquainted therewith by an inferiour Officer, Mariner or other, or such Superiour Officer, Commander or Mariner, in his own Person, receiving a Letter or Message from any such Enemy or Rebel, shall not in convenient time reveal the same to the *Admiral, Vice-Admiral or Commander* of the Squadron, he shall suffer the like pain of death, or such punishment as a *Court-Marshal* shall inflict: Now, *Spies* are put to death sometimes justly by those that manifestly have a just cause of Warring by others, by that licence which the Law of War granteth; nor ought any Person to be moved with this, that such being taken, are punished with death; for that proceeds not from their having offended against the Law of Nations, but from this, that by the same Law every thing is lawful against an Enemy: And every one as it is for his own profit, determineth either more rigourously or gently, but that *Spies* are both lawful and practicable, there is no question; for at this day by the general instructions of Fleets, there is alwayes out of each Squadron some Frigats or Ships appointed, to make discovery of the Enemy, and upon sight to make saile, and to stand with them; in order to the taking cognizance of their Force, as well Ships of War as Fire-ships, and in what posture they lay; which being done, those detecting Frigats are to speak together, and to conclude on the report they are to give, which done, they return to their respective Squadrons; such Ships in such service are not obliged to fight, especially if the Enemies Force exceed them in number, or that they shall have an apparent advantage.

VIII. Again, it is not lawfull for any, be he Friend or Neuter, to relieve an Enemy, much less for a Souldier or Mariner in pay, to supply him that conspires the destruction of my Countrey, is a liberality not to be allowed of. He is to be accounted an Enemy that supplies the Enemy with necessaries for the War; and therefore by the Laws of War is so to be esteemed; and by the Laws of England, if any Person in the Fleet relieve an Enemy or Rebel in time of War, with Money, Victuals, Powder, Shot, Armes, Ammunition, or any other supplies whatsoever, directly or indirectly, he shall suffer death.

IX. Ships being assaulted and taken as prize, all the Papers, Charter-parties, Bills of Lading, Pass-ports and other Writings whatsoever that shall be taken, seized or found aboard, are to be duely preserved, and not torn or made away; but the very Originals are to

are to be sent up entirely and without fraud to the Court of Admiralty, or to the Commander appointed for that purpose, in order to the condemnation of the Prize, upon pain of the Captors losing their share in the Prize, and also subject to such other punishment as a Court Marshall shall think fit. Artic. 6.

X. The Right of taking of Spoil was approved of GOD, within these natural bounds which have been already mentioned, is further evinc't by the appointment of GOD in his Law concerning the Acquisition of Empire over the conquered, after refusal of peace, *All the spoil thereof shalt thou take unto thy self, and thou shalt eat the spoil of thine enemies, which the LORD thy GOD hath given thee*: Hence it is, that things taken from the Enemy, presently become theirs that take them by the Law of Nations, and such acquisition is called *Natural*, for not any cause, but the naked fact is considered; And thence a Right springeth; for as the Dominion of things began from Natural possession, and some print of the same remains in the things taken in the Land, the Sea, and the Air; so likewise of things taken in War, but though this gives a Right to the Captors, yet that must be understood to the Sovereign or to the State that employ'd them, and not to themselves; but if they have any share of the Prize the same proceeds by the condescension or grant of the Sovereign, which may be enlarged or abridged as occasion serves; and therefore by the Laws of *England*, Ships of War having a Prize, the Goods and all manner of Lading is to be preserved, till Adjudication shall pass; but that is to be understood, where the Ships voluntarily yields: but Ships whom they shall assault, and take in fight or prize, the pillage of all manner of Goods and Merchandizes (other than Arms, Ammunition, Tackle, Furnitures or stores of such Ships) as shall be found by the Captors; upon or above the Gun-deck of the Ship, become theirs\*; but this is to be understood where such Prize may lawfully be possess't; for there are times when such are not to be meddled with, and therefore it is against the Rules of War in fight, if some of the Enemies Ships are there disabled; yet those Ships that did so disable them, if they are in a condition to pursue the Enemy, cannot during the fight take, possess, or burn such disabled Ships, and the reason is, lest by so doing some more important service be lost, but they are to wait for such booty, till the *Flagg-Officers* shall give command for the same. Artic. 7.

*Leg. Naturalem  
§. ult. D. de acq.  
rerum dom. tit.  
de rerum div.*

\* By the donation of His Majesty.

Artic. 8.

*Vluzzali* King of *Algier*, in the famous Battel of *Lepanto*, having behaved himself very valiantly there against the *Christians*,  
O that

that he destroy'd several of their Gallies, and others, he took amongst the rest the Gallies of *Pietro Bua* of *Corfa*, of the *Prior of Messina*, and *Ludovico Tipico* of *Trabu*, and *Benedeto Soranza*, the which he towed after him before the Battle was compleated; but that getting proved the loss both of the one and the other, for the *Turks* out of covetousness of the plunder, or otherwise thronging into them, occasioned their taking fire, in which the *Vessels* in those flames became *Villims*, and after follow'd the total rout of the *Ottoman* power.

XI. It is almost impossible, that in Ships of War, which in these dayes carry so considerable force in Men, but there will be some amongst them that have heads of knavery, and fingers of lime-twigs, not fearing to steal that from their Prince, which is applicable only for the good of their Countrey; such sort of *Night-wolves* when caught, are to be severely punished; and therefore to steal or take away any Cables, Anchors, Sails, or any of the Ships Furniture, or any of the Powder or Arms, or Amunition of the Ship, subjects the offender to the pains of death, or to such other punishment as the quality of the offence shall be found by a *Court-Martial* to deserve.

*Hist. Repub. Venet.* 127, 128

*Artic. 8.*

*Craesus* persuading *Cyrus* not to give up *Lydia* to be pillaged by his Men, tells him, *Non meam, inquit, non res meas diripies, nihil enim ad me jam ista pertinent: tua sunt: tua illi prae-dest, Herod.* lib. 1.

\* *Victor. de Fure Bellin.* 49 & 60.  
† *D. & C. de Fure & furti* 19.

Princes indeed are *Gods*, but neither do the *Gods* hear the prayer of Suppliants, except they be just.

\* The *Syracensians* were ac-

XII. By the ninth Article, Foreign Ships or Vessels taken as Prize, without fighting, none of the Captains, Masters or Mariners being Forreigners, shall be stripped of their cloaths, or in any sort beaten, pillaged, or evil entreated; and the Persons so offending are obliged to render double damage: this Law most expressly doth not extend to those that obstinately shall maintain a Fight; for most certain, by the Law of Arms, if the Ship be boarded and taken, there remains no restriction, but that of charity; and if a Ship shall persist in the engagement, even till the last, and then yield to mercy, there has been some doubt, \* whether quarter ought to be given to such; (for they may ignorantly † maintain with courage a bad cause: ) but Captives, and those that yield or desire to yield, there is no danger; Now, that such may be justly killed, there must be some antecedent crime, and that such a one as an equal Judge would think worthy of death; and so we see great severity shew'd to the Captives and those that have yielded; or, their yielding on condition of life not accepted; if after they were convinced of the injustice of the War, they had nevertheless persisted with hatred or cruelty; if they had blotted their Enemies Name with unsufferable disgraces; if they had violated their Faith or any Right of Nations, as of Ambassadors; if they were fugitives: But the Law of Nature admits not taliation, \* except against the very individual Person that hath offended; nor doth it suffice, that the

the Enemies are by a fiction conceived to be as it were one Body; though otherwise by the Laws of Nations, and by the Laws of Arms, and at this day practised, in all Fights, the small Frigots, Ketches and Smacks, are to observe and take notice of the Enemies Fire-Ships, and to watch their motion, and to do their best, to cut off their Boats, and generally the Persons found in them are to be put to death, if taken, and the Vessel if not taken, destroy'd; and the reason why the extremity of War is used to such, is, that by how much the mischief is the greater by the act of such Men if executed, by so much the punishment is aggravated if taken, and quarter deny'd them by Law of War.

XIII. Every Captain or Commander upon signal † or order of Battel, or view, or sight of any Ships of the Enemy, Pirat, or Rebel, or likelihood of engagement, they are to put all things in the Ship in fit posture for a Fight, as the breaking down the Cabins, clearing of the Ships of all things that may impede the Souldiers in the preserving the Ship and themselves, and endamaging the Enemy; and every such Commander or Captain are in their own Person, and

† In England when the Admiral would have the Van of the Fleet to tack first, the Admiral did generally put aboard the Union Flag, at

the staff on the fore-top-Mast head (that was when the Red Flag was not abroad.) But if the Red Flag had been abroad, then the fore-top-sail was to be loured a little, and the Union Flag was to be spread from the Cap of the fore-top mast downwards. When the Reer of the Fleet was to tack first, the Union Flag was put abroad on the Flag staff of the Mizon top Mast-head, upon which two signals the Flag ships were to continue the same signals on their Ships, till the same was answered. When the Admiral would have all the Ships to fall into the Order of Battel prescribed at the Council of War, the Union-Flag was put on the Mizon peak of the Admiral's Ship, upon sight of which the Admirals of the other Squadrons were to answer it by doing the like signal. When the Admiral would have the other Squadrons to make more saile, though himself shorten saile, a white Ensign was put on the Ensign-staff of the Admiral's Ship. Instruction first of May 1666. But yet Signals may be altered or changed as often as it shall please the Admiral to think the same necessary and convenient.

according to their Place, to hearten and encourage the inferiour Officers and common Men to fight valiantly and courageously, and not to behave themselves faintly, under the disgrace of being cashiered; and if he or they yield to the Enemy, Pirat or Rebel, or cry for quarter, he or they so doing, shall suffer the pains of death, or such other punishment as the offence shall deserve. Now, though Souldiers or Mariners have obliged themselves faithfully to serve in the Expedition or Navy; yet that is to be understood no further than his or their power to do his utmost in his or their Quality: for though the obligation for the Service be taken in the strictest terms of undergoing death and danger; yet it is to be understood alwayes conditionally as most promises are, viz. if the action or passion may be for

*Lipſius de Mil.  
Rom. l. 1. dial. 6.  
C. 4. And Poly-  
bius expreſſeth  
the Oath thus,  
Obtemperaturus  
ſum, & ſacſurus  
quicquid man-  
dabitur ab Impe-  
ratoribus, jux-  
ta vires: and  
ſuch, ſayes he,  
were termed Mi-  
lites per Sacra-  
mentum.*

that Fleet or Princes advantage; and therefore if the Fleet or Squadron is beaten, and the Ships are disabled, and left ſcarce without any to defend them, now the Souldiers or Mariners remaining can do no more for their Prince than die, which indeed is to do nothing at all, but to ceaſe for ever from doing any thing either for him or themſelves; in thoſe ſtraits therefore it is not repugnant to their Oath, called *Sacramentum Militare*, to ask quarter or ſtrike, and having begg'd a new Life and taken it, they are bound in a new and juſt obligation of Fidelity to thoſe whom they were bound to kill few hours before, neither can the Prince or General expect by virtue of their former obligation to him, they ſhould kill any in the place where the quarter was given: However, this Fidelity hath not its inception; from the time of taking quarter; but when the Battel is over; and that time which is termed cold blood; for without all controverſie, if a Ship be boarded, and the Quarter is given, yet if while the Fight laſts, the Perſons captives can by any poſſibility recover their Liberty and Ships, they may by the *Law of Arms* juſtly acquire the ſame.

And ſince impunity is granted to ſuch unfortunate deſertors, yet it muſt be apparently evident and fully proved, that they were reduced into a condition beyond all hope in the Battel: and therefore the ſeet that forſook the *Unfortunate Pompey* before the field was loſt, were juſtly condemned for the breach of the *Roman* Diſcipline and Law of Arms: And therefore the Article hath not poſitively declared death only, but added, or ſuch other puniſhment as the offence ſhall deſerve, which proviſion leaves the Action to be judged and puniſhed by a *Council of War*, who know beſt what's to be done in caſes of that nature; however, a baſe or cowardly yielding, or crying quarter, is be puniſhed with death, and that without mercy.

*Xenoph. Cyr.  
Plutarch. Queſt.  
Rom. 39. & Mar-  
cello. Vide in Tit.  
Ships of War.*

XIV. The obeying of Orders hath in all Ages been in mighty eſteem: *Chryſantus*, one of *Cyrus's* Souldiers, being upon his Enemy, withdrew his Sword, hearing a retreat ſounded; but this comes not from the external *Laws of Nations*, for as it is lawful to ſeize on the Enemy's Goods, ſo likewiſe to kill the Enemy, for by that Law the Enemies are of no account; but ſuch obedience proceeds from the *Military Diſcipline* of ſeveral Nations: By the *Romans*, it was a Law † noted by *Modestinus*, that whoſoever obey'd not his Orders, ſhould be puniſh'd with death; though the matter ſucceeded well, now he alſo was ſuppoſed not to have obey'd, \* who out of Order, without the Command of the General entered into any Fight.

† *Leg. deſertorem. D. de re Milit.*

\* *Livy lib. 7. Manliani Impetrina.*



For if such Liberty were lawful, either Stations would be deserted, or (Licence proceeding) the Army, Fleet, or Squadron would be engag'd in unadvised Battels, which by all means is to be avoided. *M. Capello*, a Venetian Gentleman of an Ancient Extraction, having the charge of the *Guarding the Venetian Gulph*, \* met with the *Barbary Fleet*, whom he so assaulted, that he burnt and took divers of them; among the rest the *Admiral Galley of Algier*, (a Vessel of vast bigness) which he brought with him away, and she remains at this day a *Trophy* in the *Arsenal of Venice*; the service although Noble and Honourable, and such as brought renown to the Republicque, yet in regard it was an Action exceeding his

The Order of Battle is to be preserved, and in all cases they are to endeavour to keep in one line as much as may be, and though they have beaten some of the Enemy

yet must they not pursue a small number, before the main of the Enemy be beaten or run: Nor ought they in chasing, chase beyond sight of the Flaggs, and at night all chasing Ships, are to return to the Flaggs. *Iust. 22, 23. in 1. May 1666. \* Hist. of the Repub. of Venice, fol. 170. 171.*

Commission, he was adjudged to punishment: (but his great Merit and Alliance preserved his Life) such an exact obedience that *Seignior* expects to be pay'd to her Orders, be the success never so Glorious: And by the eleventh Article, every Captain, Commander, and other Officer, Sea-man or Souldier of any Ship, Frigot or Vessel of War, are duly to observe the Commands of the Admiral, or other his Superiour, or Commander of any Squadron, as well for the assaulting, and setting upon any Fleet, Squadron, or Ships of the Enemy, Pirat or Rebels, or joyning Battle with them, or making defence against them, as all other the Commands of the Admiral, or other his Superiour Commander, the disobeying of which subjects them to the pains of death, or such other punishment, as the quality or neglect of his offence shall deserve. *Artic. 11.*

XV. Again, every Captain, and all other Officers, Mariners and Souldiers of every Ship, Frigot, or Vessel of War, shall not in time of any Fight or Engagement, withdraw or keep back; but on the other hand, they are to come into the Battle, and engage, and do their utmost endeavour to take, fire, kill, and endamage the Enemy, Pirat or Rebel, and assist and relieve all other his Confederate Ships; and if they shall prove cowards, they are to be dealt with as cowards ought by the Law of Arms, which is to suffer death: But circumstance of things may make alteration of matters, therefore there is added, or other punishment as the circumstance of the offence shall deserve, or a Court-Marshal think fit. *Artic. 12.*

There are some Offices to be done, even to them from whom

*Cicero Offic. 1.*  
*Ch. 2.*

\* *Grot. de Jure*  
*Bell. ac Pacis l. 1.*  
*cap. 2. §. 1.*

*Misericordia in-*  
*for: uniis debe-*  
*tur: at qui de-*  
*liberata scientia*  
*male agit, non*  
*infelix sed inju-*  
*stus: And Ci-*  
*cero hath a say-*  
*ing out of De-*  
*mosthenes: We*  
*must shew com-*  
*passion to those*  
*whom fortune,*  
*not their own*  
*deeds have made*  
*miserable.*

*Scipio Emilia-*  
*nus at the over-*  
*throw of Car-*  
*thage, proclaim-*  
*ed that they*  
*should flee that*  
*would. Polybius,*  
*vide Tacitus An-*  
*nal. 12.*

*Vide Serran. in*  
*reb. Franc. 1. &*  
*Hen. 2. Thueyd.*  
*lib. 3.*

\* *Cæsar lib. 2. de*  
*Bello Gallico*

† *Dinant in Ger-*  
*many, being ta-*  
*ken by assault,*  
*the town was*  
*raised and burnt,*  
*and the prisoners*  
*all put to death.*  
*Vid. Plin. Com-*  
*mos lib. 2. cap. 1.*

you have received an injury; for revenge and punishment must have a measure; and therefore the issues of the *Roman Wars* were either mild or necessary. Now when killing is just in a just War according to internal Justice may be known by the examining the causes or end of the War, which may be for the conservation of Life and Members, \* and the keeping and acquiring of things usefull unto Life; now in the assaulting of Ships, it happens that one is slain on purpose, or without purpose: on purpose no Man can be slain justly, unless either for just punishment, as without it we cannot protect and defend our Life, our Goods, our Countrey, &c. That such punishment may be just, it is necessary, that he who is slain, have offended, and that so much as may be avenged with the punishment of death in the Sentence of an equal Judge, be expected: now we must note between full injury and meer misfortune often intercedes some mean, which is as 'twere composed of both; so that it can neither be called the act of one knowing and willing, nor meerly the act of one ignorant or unwilling.

This distinction by *Themistius* is fully illustrated; *You have made a difference 'twixt an injury, a fault, and a misfortune, although you neither study Plato, nor read Aristotle, yet you put their Doctrine into practice; for you have not thought them worthy of equal punishment, who from the beginning perswaded the War, and who afterward were carried with the stream, and who at last, submitted to him, that now seem'd to have the best power; the first you condemned, the next you chastised, the last you pitie:* Most certain to spare Captives or Prisoners of War, is a command of goodness and equity; and in Histories they are often commended, who when too great a number prove burdensome or dangerous, chose rather to let them all go than to slay them, or detain them, though for Ransomes; as the last *Flemish Wars* with *English*: so for the same causes, they that strike or yield up themselves are not to be slain, (though there is no provision made by Covenant. In Towns besieged it was observed by the *Romans*, before the *Ram* had smitten the Wall; *Cæsar* \* denounceth to the *Adriatici*, he would save their City, if before the *Ram* had touched the Wall, they yielded; which is still in use in weak Places, before the great Guns are fired; in strong Places before an Assault is made upon the Walls; and at Sea, by firing one or two Guns, or hanging out the bloody Flag, according as the instruction are: however, till there be an absolute yielding or quarter cry'd, by the *Law of Arms*, as well as by the above mentioned Article, every Commander and Souldier is to do his utmost, to take, fire, kill and endamage the Enemy, or whatsoever may tend thereunto.

XVI. By

XVI. By the *Law of Arms*, he deserves punishment who doth not keep off force that is offered to his fellow Souldier; and though it hath been conceived, that if there be manifest danger, that he is not bound to come in to his relief: for such Commanders may prefer the lives is his own Ship, before those in another; yet that suffices not; for every Souldier by the *Law of Arms*, is not only bound to defend, but likewise to assist and relieve his Companion: Now Companions are in two respects, either those that are in actual service with such Souldiers, or those that are not, but only committed to their protection or Convoy, which are to be defended and guarded at the same peril and charge that a fellow Souldier is; and therefore all Ships that are committed to Convoy and Guard, they are diligently and carefully to be attended upon without delay, according to their Instructions in that behalf: And whosoever shall be faulty therein, and shall not faithfully perform the same, and defend the Ships and Goods in their Convoy without either diverting to other parts or occasions, or retusing or neglecting to fight in their defence, if they be set upon or assailed, or running away cowardly, and submitting in their Convoy to hazard and peril, or shall demand or exact any Money or other reward from any Merchant or Master, for conveying of any such Ships or other Vessels belonging to *His Majesty's* Subjects, shall be condemned to make reparation of the damage to the Merchants, owners, or others, as the *Court of Admiralty* shall adjudge, and also be punished criminally according to the quality of their offences, be it by pains of death or other punishment, according as shall be adjudged fit by that *Court Marshal*: Now, those Ships that are not under Convoy, but engaged in fight, are faithfully to be relieved; and therefore if a Squadron shall happen to be over-charged and distressed, the next Squadron or Ships are to make towards their relief and assistance upon a signal given them; which is generally given in the *Admirals* Squadron by a Pendant on the Fore-top-Mast-head of any Flag-Ship in the *Vice-Admirals* Squadron, or he that commands in Chief in the second place, a Pendant on the Main-top-Mast-head, and the *Rear-Admirals* Squadron the like: but these signals sometimes change, according to the wisdom and resolution of the *Admiral*: Again, Ships that are disabled by loss of Masts, shot under Water, or the like; so as they be in danger of sinking or taking, the distressed Ships generally make a sign by waft of their Jack and Ensigns, and those next to them are bound to their relief; but yet this does not always hold place, for if the distressed Ship is not in probability of sinking, or otherwise encompassed with the Enemy, the reliever is not to stay under pretence

I will defend my Companion at the cost of my own Blood, and partake in his danger *Sene. de Ben. 2. 15.*

of.

of securing them, but ought to follow his Leader and the Battle, leaving such lame Ships to the Stern most of the Fleet; it being an undoubted Maxime, *That nothing but beating the Body of the Enemy can effectually secure such disabled Ships.*

Artic. 14.

But that is to be understood as in the XII. §. of this Chap.

XVII. It is not enough that Men behave themselves valiantly in the beating of an Enemy, for that is not all, but the reducing of him into a condition to render right either for damage done, or to render that which is right; which cannot well be done without bringing him to exigences and straits; and therefore if the Enemy, Pirate, or Rebel be beaten, none, neither through cowardize, negligence, or disaffection, ought to forbear the pursuit, and those of them flying, nor ought such either through cowardize, negligence or disaffection, forbear the assisting of a known friend in view to their utmost power, the breach of which subjects the offenders to the pains of death, or at least such punishment as a *Court Marshal* shall think fit.

*Empires* are got by Arms, and propagated by Victory; and by the *Laws of War*, they that have overcome, should govern those they have subdued: Hence it is, that Generals having compleated a Conquest in a Just War, and in chase or otherwise have taken the Ships or Goods of the Enemy, have absolute power over the Lives, Estates, Ships and Things that they by force of Arms have acquired by the *Laws of Nations*.

† Tacitus 3. *Annal.* Pompeius *gravior remediis quam delicta evant.*

But yet in such Conquests, where the reeking sword knows no Law, that is, they are done *impune*, without punishment: because coercive Judges do grant them their Authority; † but yet such power may be exorbitant from that Rule of Right called *Virtue*; and therefore by the *Law of War* Captives may be slain, yet what Law forbids not, modestly prohibits to be done. Hence it is, that *Generals* do often restrain that power of killing; for though such Prisoners of War do fight for the maintenance of an unjust cause, and although the War is begun by a solemn manner; yet all acts that have their rise from thence, are unjust by internal injustice; so that they who knowingly do persist in fighting, † yet ought they not all wayes to be slain, according to that of *Seneca*; *Cruel are they*, saith he, \* *that have cause of punishment, but have no measure*: For he that in punishing goes further than is meet, is the second author of injury; and the principal reason why mercy is often shew'd, is, for that Souldiers of fortune offend not out of any hatred or cruelty, but out of duty.

† Grotius de *Jure Belli ac Pacis*, lib. 3. cap. 10. §. \* 2. De *Clem.* cap. 4.

XVIII. Again, *Generals* in the measure of killing, look no further commonly than the destruction of those who by force of Arms

oppose them: and though Ships or Cities are taken by assault, the which by the Laws of War subjects every individual to the mercy of the Conquerour; yet Children, Women, Old Men, Priests, Scholars and Husband-men are to be spared; the first by the Law of Nature, according to that of *Camillus*, *We have Arms*, sayes he, *not against that Age which even in taking Cities is spared, but against armed Men*, and this is the Law of Arms amongst *Good Men*; by which we are to note, that by the words *Good Men*, as is observed, † he means the Law of Nature) for strictly by the Law of Arms, the slayers of them are without punishment.

Now, that which hath place in Children alwayes that have not attained the use of Reason, for the most part prevails with Women; that is, unless they have committed something peculiarly to be avenged, or do usurp Manly Offices; as flinging of stones from the walls, \* pouring down burning pitch and brim-stone, and the like bituminous stuff, firing of Guns and the like, for it is a Sex that hath nothing to do with the Sword, that are capable of that clemency.

The like for old Men, whom *Papinius* observes, are not to be slain; so for Ministers of Sacred things, even Barbarous Nations, have had them in reverence and preservation; as the *Philistines* enemies of the *Jews*, did to the *Colledge of Prophets*, whom they did not harm: and with those Priests are justly equalled in this respect, they that have chosen a like kind of life, as *Monks* and *Penitents*, whom therefore as well as Priests the *Canons* following in natural equity, will have spared. \* To these are deservedly added those that give themselves to the Study of good Learning and Sciences useful to Mankind, be it in *Universities*, or other publique *Schools* or *Colledges*.

To these are added *Tradesmen*, † so likewise *Merchants*, which is not only to be understood of them that stay for a time in the Enemies Quarters, but of perpetual Subjects, for their Life hath nothing to do with Arms, and under that name are also contained other *Work-Men* and *Artificers*, whose gain loves not War, but Peace.

Again, *Captives*, and they that yield, are not to be slain, for to spare such is a *Command of goodnes and equity*, sayeth *Seneca*; \* nor are *Hostages* to be destroy'd, according to that of *Scipio*; who said, He would not shew his Displeasure on harmless *Hostages*, † but upon those that had revolted, and that he would not take revenge of the unarmed, but the armed Enemy: † This is very true, by the Law of Arms, if the Contract be broke for which they be-

*In Vita Camilli*  
*Livy lib. 1. & 5.*

† *Grotius de*  
*Jure Belli ac Pa-*  
*cis lib. 3. cap. 11.*  
who observes  
that many pre-  
tences may be  
found out a-  
gainst Men of  
mature age, but  
against Infants,  
calumny it self  
can find no-  
thing to say, as  
being clearly in-  
nocent.

\* *Herod. in Vi-*  
*ta Maximin.*  
*fol. 417.*  
*Papin. nullis*  
*violabilis armis*  
*Turbanensis. Vic.*  
*D. loco.*

1 *Sam. 10. 5. 30.*  
1 *Sam. 19. 18.*  
Lord *Coke's*  
Comment on  
30 *Cap. of Mag.*  
*Charia, fol. 58.*  
*C. de Treuga &*  
*Pace.*

*Leg. execut. C.*  
*qua respign.*

*Vide 2. Inst. fol.*  
*58. & Trin. 31*

*E. 1. coram Rege*  
*Rot. 127.*

\* *De Brunf. 5.*  
*cap. 18.*

† *Livy lib. 28.*  
The same faith  
*Julian in Nic-*  
*tas.*



\* *Grot. de Jure  
Bell. ac Pacis*,  
lib. 3. cap. 11.

came Hostage, they may be slain, that is, the slayer is without punishment: But yet some \* conceive the slayer is not without sin, for that no such Contract can take away any Mans life, that is, I suppose an Innocents life; but without controversie, if those that become Hostage be or were before in the number of grievous Delinquents, or if afterwards he hath broken his Faith given by him in a great matter, the punishment of such may be free from injury.

† 2. de Ira cap.  
10. *Quicquid  
multis peccatur  
inultum est. Ma-  
gis moriendo  
quam minando: sic enim agendum est cum multitudi-  
ne peccantium; severitas autem exercenda est in  
peccatis paucorum.* *Gailus de pace pub. lib. 11. cap. 9. 36.*

XIX. Where offences are of that nature as they may seem worthy of death, as Mutiny, and the like, &c. it will be a point of mercy, because of the multitude of them to remit extream Right, according to that of *Seneca*; † *The severity of a General shews itself against particulars, but pardon is necessary where the whole Army is revolting. What takes away anger from a wise Man? the multi-*

† *Vide Grot. lib. inde of Transgressors.*  
3. cap. 11. §. 17.

Hence it was, that casting of Lots † was introduced, that too many might not be subjected to punishment.

\* *Victor de Jure  
Bell. n. 59. lib. 2.*

However, all Nations have generally made it a standing Rule in the punishment of Mutineers, as near as possible to hunt out the Authors, and then make examples of \*.

Artic. 15.

And therefore by the 15th Article, if any Man at any time when Service or Action is commanded shall presume to stop or put backwards or discourage the said Service and Action, by pretence of arrears of wages, or upon any pretence of wages whatsoever, they are to suffer death; and indeed the same ought to be without mercy, by how much the more they may raise a mutiny at a time when there is nothing expected but Action, and the shewing the most obsequious duty that possibly may be; the breach of which may occasion the damage of the whole Fleet, and being of such dangerous consequence, ought severely to be punished: So likewise the uttering of any words of Sedition or Mutiny, or the endeavouring to make any mutinous Assemblies upon any pretence whatsoever, is made death: And the very concealers of any trayterous and mutinous practices, designs or words, or any words spoken by any to the prejudice of *His Majesty* or Government, or any words, practices, or designs tending to the hindrance of the Service, and shall not reveal them, subject them to such pains and punishment as a *Court-Marshal* shall think fit. And whereas in case of the offences committed against any of the Articles for the Government of any of *His Majesties* Ships of War, with-

Artic. 19.

Artic. 20.

within the Narrow Seas, wherein the pains of death are to be inflicted, execution of such Sentence ought not to be made without leave of the Lord Admiral; this of mutiny is totally excepted, for such may be executed immediately.

XX. It is not lawful for Princes or States to make of their Enemies Traytors, or to desert the Service of their Prince, or to bring over their Ships, Ordinance, Provisions or Arms; for as it is not lawful for any Subject to do the same, so likewise to tempt him; for he that gives a cause of sinning to another, sins also himself; but if a Man will voluntarily, without any other impulse than his own, bring over the Ships or Armies, or deserts the Service of his Prince to serve another; this, though a fault in the Deserter, is not in the Receiver, *We receive a Fugitive by the Law of War, (saith Celsus \*) that is, it is not against the Law of War to admit him, who having deserted his Princes part, elected his Enemies; nor are such to be rendered, except it shall be agreed, as in the Peace of Lewis the 11th.* \* However such sort of Gamesters, if caught, are to be severely punished; and therefore it is provided, that if any Sea-Captain, Officer, or Sea-Man shall betray his trust, or turn to the Enemy, Pirat or Rebel, or run away with their Ship or Ordinance, Ammunition or Provision, to the weakening of the Service, or yield the same up to the Enemy, Pirat or Rebel, shall be punished with death; so likewise if any shall desert the Service, or the Employment, which they are in on Ship-board, or shall run away, or entice any other so to do, they are subject to the like pain of death. And by the Law of Nations, such desertors that run away from their Colours or Fleet before Peace proclaimed and concluded, all Persons of that Prince from whom they fled, have a right indulged to them to execute publique revenge.

XXI. By the Law of Nations, † Spies may be sent to view and survey the Enemies Force, Fleet, Station, and make discovery of whatsoever may give advantage to the Persons sending, as is mentioned above; but being deprehended, they are to be put to death; and therefore if any Person shall come from, or be found in the nature of Spies, to bring any seducing Letters or Messages from any Enemy or Rebel, or shall attempt or endeavour to corrupt any Captain, Officer, Mariner, or other of the Navy or Fleet, to betray his or their trust, or yield up any Ship or Ammunition, or turn to the Enemy or Rebel, he shall be punished with death.

XXII. Souldiers and Mariners owe all respect and duty to their Superiour Officers; and therefore when they are in anger, they ought to avoid them; but above all, not to quarrel with, or give

Artic. 34.

Grot. de Jure Bel.  
lib. 2. Pacis lib. 3.  
cap. 1.

\* Leg. Transjurgum D. de acqu.  
rerum dom. Po.  
lyb. in excerp. Lo-  
gat. 9. 28. 34.  
Menander Pro-  
rector idem nos  
docet.

\* Phil. Camines  
lib. 4. cap. 12.

Artic. 16.

Artic. 17.

Titul. Apolog.

9. c. quando li-

ceat, lib. 2. in

reos majestatis

& publicos hostes

omnis homo mi-

les. Vide Grot.

lib. 1. cap. 15.

Vide Hesley Rep.

235. 1. H. 7. cap.

1. 3. H. 8. cap. 5.

† Livy lib. 2. lib.

3. 9. ult. ad leg.

Corn. de Sicariis

pun.

Artic. 18.

them any provoking Language: and therefore by the Law of Arms; a Souldier who hath resisted his Captain, willing to chastise him, if he hath laid hold on his rod, is cashier'd, if he purposely break it, or laid violent hands upon his Captain, he dies: \* And by the Laws of England, if any Person shall presume to quarrel with his Superiour Officer, he shall suffer severe punishment; and if he strikes him, shall suffer death, or otherwise as a *Court-Marshal* shall adjudge the matter to deserve. †

\* *Leg. militis. D. de re milit. R. s. Legi militum, cap. 15.*

† *Artic. 21.*

XXIII. And though Mariners and Souldiers may have just cause of complaint, as that their victuals or provisions are not good, yet must they not mutiny or rebel, whereby to distract or confound the whole Crew; but must make a civil and humble address to their Commander, that the same may be amended; and if the case be such, that the Commander cannot redress the same, by going to Port to supply the exigencies, without detriment of the Fleet (as if ready to engage, or the like) they must like Men and Souldiers bear with the extremity, considering that it is better that some Men should perish, nay, the whole Crew in one Ship, than the whole Fleet, nay perhaps the whole Kingdom be destroyed: And therefore if any in the Fleet find cause of complaint of the unwholesomeness of his victuals, or upon other just ground, he shall quietly make the same known to his Superiour, or Captain, or Commander in chief, as the occasion may deserve, that such present remedy may be had, as the matter may require; and the said Superiour or Commander is to cause the same to be presently remedied accordingly; but no Person upon any such or other pretence shall privately attempt to stir up any disturbance, upon pain of such severe punishment, as a *Court-Marshal* shall think fit to inflict.

*Bacon maxim. fol. 17. Privilegium non valet contra rempublicam.*

*Artic. 24.*

XXIV. And as the Law doth provide that there be no waste or spoil of the Kings provision, or imbezlement of the same; so likewise that care be taken, the Ships of War neither through negligence or wilfulness be stranded, split or hazarded, upon severe penalties. In fights and when great Fleets are out, there are generally instructions appointed for all *Masters, Pilots, Ketches, Hoyes, and Smacks*, who are to attend the Fleet, and to give them notice of the Roads, Coasts, Sands, Rocks, and the like, and they have particular stations allotted them, and orders given, that if they shall find less waters than such a proportion, they then give a signal as they are directed to give, and continue their signals till they are answered from the Capital Ships.

*Artic. 25.*

But in time of Fight, they generally lay away their head from Fleet, and keep their lead, and if they meet with such a proportion

portion of water as is within their directions, they are to give such signal as they receive Orders for, and stand off from the danger; but the wilfull burning of any Ship or Magazine-store of Powder, *Artic. 27.* Ship-boat, Ketch, Hoy or Vessel, or Tackle, or Furniture thereunto belonging, not appertaining to an Enemy or Rebel, shall be punished with death.

XXV. There are other faults often committed by the Crew, the which the Law does punish, as a quarrelling on Ship-board, using provoking speeches tending to make quarrel or disturbance, <sup>a</sup> murders, <sup>a</sup> *Artic. 23.* wilful killing of any Man, <sup>b</sup> Robbery, Theft, <sup>c</sup> and the unnatural sin of Sodomy and Buggery, <sup>b</sup> *Artic. 28.* committed with Man or Beast, all which, and all other faults and misdemeanors are punished with death, or according to the Laws and Customs in such cases used at Sea; <sup>d</sup> and when any Persons have committed any of the offences particularly mentioned in the *Stat. of 13. Car. 2. cap. 9.* and contained in the Articles or any others, and for the which they shall be committed, the *Provost-Marshal* is to take them into custody, and not suffer them to escape <sup>e</sup>, and all Officers and Sea-Men are to be aiding and assisting to Officers for the detecting and apprehending of offenders. <sup>c</sup> *Artic. 29.* <sup>d</sup> *Artic. 33.* <sup>e</sup> *Artic. 31.*

Touching the punishments that the *Roman Generals* used to their Souldiers, when they were at a *Court Marshal* found faulty, they were commonly proportioned according to the offence committed: Sometimes they were easie, of which sort were those which only brand the Souldier with disgrace; others were those that came heavy on the Person or Body; to the first belonged a shameful discharging or cashiering <sup>f</sup> a Mariner or Souldier from the Army, <sup>f</sup> *Ignominio a dimisso.* and generally lookt on as a matter of great disgrace, which punishment remains at this day for offences as well in *England*, as in most parts: A second was by stopping of their \* Pay, such \* *Fraudat. stipendii. Rosin.* Souldiers which suffered this kind of mulct, were said to be *Arre- Ant. Rom. lib. 10. cap. 25.* *re dicti*, for that *Ar illud dicebatur in fiscum, non in Militis sacculum*; the which is, and may at this day be inflicted, especially on such as shall wilfully spoil their Arms, and the like sort of offences: A third was a Sentence enjoyn'd on a Souldier to resign <sup>†</sup> up his Spear; for as those which had atchieved any Noble Act, were for their greater Honour, *Hasta pura donati*, so others for their greater disgrace were inforc'd to resign up that Military weapon of Honour: A fourth sort of punishment was, that the whole Cohort; which had lost their *Banners* or *Standards*, either in the Fields or at Sea, were inforc'd to eat nothing but Barly-bread, being deprived of their allowance in Wheat, and every *Centurion* in that Cohort had his Souldiers belt or girdle taken from him, which was

Godwin Antiq.  
Rom. fol. 127.

no less disgrace among them than the degrading (among us) one of the *Order of the Garter*: for petty faults they generally made them stand bare-footed before the *General's Pavilion*, with long poles of ten foot in length in their hands, and sometimes in the sight of the other Souldiers to walk up and down with turfs on their necks, sometimes carrying a beam like a fork upon their shoulders round the Town; the last of their punishments was, the opening of a Vein, or letting them blood in one of their arms, which generally was inflicted on them who were too hot and bold.

Lips. de milit.  
Rom. lib. 5. Dial.  
13.

The great Judgements were, to be beaten with rods, which was generally inflicted on those who had not discharged their Office, in the sending about that *Table* called *Tessera*, wherein the Watchword was written, or those who had stolen any thing from the Camp, or that had forsaken to keep Watch, or those that had born any false witness against their Fellows, or had abused their Bodies by Women, or those that had been punished thrice for the same fault, sometimes they were sold for bond-Slaves; beheaded and hang'd: But the last, which was in their mutinies, the punishment fell either to Lots, as the tenth, twentieth, and sometimes the hundredth Man, who were punished with Cudgelling, and with these punishments those in *England* have a very near affinity, as cleansing the Ship, losing pay, ducking in the water, beaten at the Captains head, hoisted up the main-yard and with a shovel at their back, hang'd, and shot to death, and the like.

37 H. 6. fol. 4, 5.

XXVI. The *Admiral* may grant Commissions to inferior *Vice-Admirals* or *Commanders in chief* of any Squadron of Ships, to assemble *Court-Marshalls*, consisting of *Commanders* and *Captains*, for the Tryal and Execution of any of the offences or misdemeanours which shall be committed at Sea; but if one be arraigned before them, the same works no corruption of blood or forfeiture of Lands, nor can they try any person that is not in actual Service and Pay in *His Majesties* Fleet and Ships of War.

13 Car. 2. cap. 9.

But in no case where there is Sentence of death, can the execution of the same be without leave of the *Lord Admiral*, if the same be committed within the narrow Seas; yet this does not extend to mutiny, for there in that case the party may be executed presently.

All offences committed in any voyage beyond the narrow Seas where Sentence of death shall be given upon any of the aforesaid offences, execution cannot be awarded nor done, but by the Order of the Commander in chief of that Fleet or Squadron, wherein Sentence of death was passed.

XXVII. The Judge Advocate hath power given by the words  
of



of the Statute, to administer an Oath in order to the Examination or Tryal of any of the offences mentioned in the Stat. of 13 Car. 2. cap. 9. and in his absence, the *Court-Marshal* has power to appoint any other Person to administer an Oath to the same purpose.

This Statute enlarges not the Power and Jurisdiction of the *Admiral* any further, than only to the above-mentioned offences in no case whatsoever, but leaves his Authority as it was before the making of this Statute.

Nor does it give the *Admiral* any other or further power to enquire and punish any of the above-mentioned offences, unless the same be done upon the main Sea, or in Ships or Vessels, being and hovering in the main stream or great Rivers, only beneath the Bridges of the same Rivers nigh to the Seas, within the \* Jurisdiction of the *Admiralty*, and in no other place whatsoever. \* 15 R. 2. cap. 3.

XXV III. As Souldiers and Mariners for the honour and safety of the Realm, do expose daily their lives and limbs, so the Realm hath likewise provided for them, in case they survive and should prove disabled or unfit for Service, a reasonable and comfortable maintenance to keep them; the which the Justices of the Peace have power yearly in their *Easter Sessions* to raise by way of a Tax, for a weekly relief of maimed Souldiers and Mariners. Stat. 43 Eliz. cap. 3.

The maimed Souldier or Mariner must repair to the *Treasurer* of the County where he was prest, if he be able to travel; if he was not, then to the *Treasurer* of the County where he was born, or where he last dwelt by the space of three years; but if he proves unable to travel, then to the *Treasurer* of the County where he lands.

He must have a Certificate under the Chief Commander, or of his Captain, containing the particulars of his hurt and Services.

The allowance to one not having been an Officer, is not to exceed ten pounds per Annum;

Under a Lieutenant ——— 15, }

A Lieutenant ——— 20. }

Till the Mariner arrives at his proper *Treasurer*, they are to be relieved from *Treasurer* to *Treasurer*, and when they are provided for, if any of them shall go a begging or counterfeit Certificates, they shall suffer as common Rogues, and lose their Pensions: Over and above this Provision, His Sacred Majesty hath provided a further supplement for his maimed Mariners and Souldiers disabled in the Service, which is issued out of the *Chest* at *Chatham*, and constantly and duly pay'd them; and for his Commanders, Officers and others that served aboard, he, of his Royal Bounty, hath given to those that bear the character of War, and purchase the same by their

their fidelity and valour, a pious Bounty called *Smart-Money*, over and above their Pay.

*Vide Salmuth  
in Pancir. Leg.  
rerum deprec.  
Ca. de Triumph.  
Dion. Halicarn.  
lib. 5.*

XXIX. The wisdom of the *Romans* was mightily to be commended, in giving of *Triumphs* to their *Generals* after their returns, of which they had various sorts; but the greatest was when the *General* rid in his Chariot, adorned and crowned with the Victorious Laurel, the *Senators* with the best of the *Romans* meeting him; his Souldiers, (especially those who by their valour had purchast *Coronets*, *Chains*, and other *Ensigns* of Reward for their Conduct and Courage) following him: but what alas! could these to the more sober represent, any other but horror, since the centers from whence the lines were drawn, could afford nothing but death, slaughter and desolation on those who had the Souls and Faces of Men; and if it were possible, that that Blood, which by their Commissions was drawn from the sides of Mankind, and for which they made those *Triumphs*, could have been brought to *Rome*, the same was capable of making of a Source great as their *Tiber*; but *Policy* had need of all its *Stratagems* to confound the Judgement of a Souldier by excessive Praises, Recompenses and *Triumphs*, that so the opinion of wounds and wooden-legs might raise in him a greater esteem of himself, than if he had an entire body. To allure others something also must be found out handsomely, to cover wounds and affrightments of death; and without this *Cesar* in his *Triumph*, with all his *Garlands* and *Musick*, would look but like a victim: but what sorrow of heart is it to see passionate Man, a ray of Divinity, and the joy of Angels, scourged thus with his own *Scorpions*? and so fondly to give himself arms in the midst of his innocent contentments, as they of *Holland* but yesterday in the midst of their *Traffique* and *Recreations* did (by the denying *His Sacred Majesty* his Right, even that Right the which his Ancestors had with so much glory acquired,) pull on their heads a War, which that *Mighty Republique* by their greatest industry and wisdom hath not been yet able to quell; the chole- rickness of War (whereby the lustful heat of so many hearts is redoubled) stirs up the lees of *Kingdoms* and *States*, as a tempest doth weeds and slimy seedment from the bottom to the top of the Sea, which afterwards driven to the shore, together with its foam, there covers *Pearls* and *Precious Stones*: and though the Cannon seems mad by its continual firing, and the Sword reeking hot by its daily slaughters, yet no good Man doubts but they even they will weather out those storms, and in the midst of those merciless Instruments, find an *inculpata tutea*, who love justice, exercise charity, and put their trust in the *Great Governour of all things*.

## C H A P. XV.

## Of Salutations by Ships of War, and Merchant-Men.

- I. *Of Salutation, how esteem'd by some in this later age.*  
 II. *Of the same pay'd in all ages as an undoubted mark of Sovereignty of this Empire.*  
 III. *Of those Seas where this right is to be pay'd to the King of England's Flag.*  
 IV. *In what manner the King of England holds this Right, and by whom to be pay'd.*  
 V. *Of those that shall neglect or refuse to do the same, how punisht and dealt withall.*  
 VI. *Where His Majesty of Great Britain's Ships are to strike their Flag, and where not.*  
 VII. *Of the saluting of Ports, Castles, Forts, how the same is to be done, and on what terms.*  
 VIII. *Of Ships of War, their saluting their Admiral and Commanders and Chief.*  
 IX. *Of Ambassadors, Dukes, Noblemen, and other Persons of Quality, how to be saluted coming aboard and landing.*  
 X. *The Admirals of any Foreign Nation, if met withall, how to be saluted and answered.*  
 XI. *Of the Men of War, or Ships of Trade of any Foreign Nation, saluting His Majesty's Ships of War, how to be answered.*  
 XII. *Of the saluting of His Majesty's own Forts and Castles, and when the salute ceases.*  
 XIII. *Of the objection that seems to be made against the necessity of such salutations.*  
 XIV. *Why Kingdoms and States attribute the effects not the cause of Rights to Prescription.*  
 XV. *That Kingdoms and Repobliques ought not to be disorder'd for the defect of Right, in presumption, and the objection in the 13. §. answered.*  
 XVI. *The inconvenience of War, and the justifiable causes of the same.*  
 XVII. *Of the causes not justifiable in War.*  
 XVIII. *Of Moderation, and the utility of Faith and Peace.*

I. **A**S Reforming Powers in all Ages made it their chiefest work to take down the great *Celestus*, and whatever else might be ombitious in the excrescencies of Civil Pomp; so we had some in this Age, who, by a new Art of Levelling, thought nothing could be rightly mended, and they planted, unless the whole piece ravelled out to the very end, and that all intermediate greatness between Kings and them, should be crumbled even to the dust, where all lying level together as in the first Chaos, spades ought even to be put into the hands of those who were heretofore adorned with Scepters, all outward tokens of Honour and Esteem, which even from the first Institution of Society seem'd by an uninterrupted stream to be continued down to Posterity, (even amongst the most barbarous Nations) was by them totally deny'd; the Hand, the Har, the Knee, (being no other but

outward signs of an inward respect) being esteemed equal with *Idolatry*; but that unhappy brood, to whom whatsoever was crooked seemed streight, and what was dark to them appears light, are now not to be accounted Men, with whom the question may admit of a Debate whether *Salutation* is Innocent, Necessary and Praise-worthy, since nothing of Reason can be found in the foundation of their Religion, Honesty or Conscience. — Therefore this Discourse is directed to Men.

II. First, it is evident by what hath been said, that the *British Seas* before the *Roman Conquest*, ever belonged to the *Isle of Great Britain*, they alwayes claiming and enjoying the sole Dominion and Sovereignty of the same, which afterwards accrued to the *Romans* by Conquest, and from them translated with its *Empire* to the Succeeding *Saxon, Danish and Norman* Successors, and in all the Reigns of those Princes there was alwayes some marks of Sovereignty pay'd, wherein the right of the same was evinct and acknowledged.

III. Now those Seas in which this Salutation or Duty of the Flag are to be pay'd, are the four circumjacent Seas, in which all Vessels whatsoever are to pay that Duty, according to the Custome of the same, and the Ordinance of King *John*. How far this Right is payable, appears in the fourth Article in the Peacemade lately between His Majesty and the *States General of the United Provinces*, in these words:

— That whateber Ships or Vessels belonging to the said United Provinces; whether Vessels of War or other, or whether single or in fleets, shall meet in any of the Seas from Cape Finisterre to the middle point of the Land Van Staaten in Norway, with any Ships or Vessels belonging to His Majesty of Great Britain, whether those Ships be single or in great number, if they carry His Majesty of Great Britain's flagg or Jack, the aforesaid Dutch Vessels or Ships shall strike their flagg and lower their Top-sail, in the same manner, and with as much respect as hath at any time, or in any place, been, formerly practised towards any Ships of His Majesty of Great Britain, or His Predecessors by any Ships of the States General, or their Predecessors.

IV. Now, His Majesty holds not this *Salutation* or Respect, by virtue of the League or of the Article, but as the same is a Right Inherent to the *Empire of Great Britain*; and therefore in the first part of the Article it is declared in these words:

— That the aforesaid States General of the United Provinces, in due acknowledgement on their part of the King of Great Bri-

Britain's RIGHT, to have His flagg respected in the Seas hereafter mentioned, shall and do declare, and agree——

Now this Right extends and subjects all Nations whatsoever that shall pass through those Seas, and between those places meeting with any of His Majesty's Ships of War, bearing his Flag, Jack, or Cognizance of Service, to strike their Top-sail, and take in their Flag, in acknowledgement of His Majesty's Sovereignty in those Seas, and if any shall refuse to do it, or offer to resist, they may be compelled *vi, manu & fortis*, for his Majesty's Honour is by no means to receive the least diminution.

V. If therefore any of his Majesty's Subjects should be so negligent or forgetful to pay that obeysance, when it may be done without loss of the Voyage, they are to be seized on, and brought to the Flag, to answer the contempt, or else the Commander may remit the Name of the Ship, Commander or Master, as also the place from whence, and the Port to which she shall be bound to the Admiral; however before she is dismiss, she must pay the charge of the shot, that her negligence or forgetfulness occasioned, and afterwards may be indicted for the same, and severely punished.

VI. In His Majesty's Seas, none of His Ships of War are to strike to any, and that in no other part, no Ship of His Majesty is to strike her Flag or Top-sail to any Forraigner, unless such forraign Ship shall have first struck, or at the same time have struck her Flag or Top sail to His Majesties Ships.

VII. But if any of the King of England's Ships of War shall enter into the Harbour of any Forraign Prince or State, or into the road within shot of Canon of some Fort or Castle, yet such respect must be pay'd, as is usually there expected, and then the Commander is to send a shore, to inform himself what return they will make to this Salute; and that if he hath received good assurance, that His Majesty's Ships shall be answer'd Gun for Gun, the Port is to be saluted, as is usual, but without assurance of being answered by an equal number of Guns, the Port is not to be saluted: And yet in that very respect before the Port is to be saluted, the Captain ought to inform himself, how Flaggs (of the same quality with that he carries) of other Princes have been saluted there, the which is peremptorily to be insisted on, to be saluted with as great respect, and advantage as any Flag (of the same quality with the Captains) of any other Prince hath been saluted in that Place.

VIII. A Captain of a Ship of the second Rate, being neither Admiral, Vice-Admiral, nor Rear-Admiral, at his first coming and



Saluting his Admiral or Commander in Chief is to give eleven Pieces, his Vice-Admiral nine, and his Rear-Admiral seven, and the other proportionably less by two, according to their Ranks, but the Commander or Captain of a Ship is not to salute his Admiral or Commander in Chief, after he hath done it once, except he hath been absent from the Flag two Months.

IX. When a Ship of the second Rate, shall carry any Ambassador, Duke, or Nobleman, at his coming aboard, he is to give eleven Pieces, and at his landing fifteen; and when he shall carry a Knight, Lady or Gentleman of Quality, at their coming aboard he is to give seven, and at the landing eleven; and the other Ships are to give less by two, according to their ranks and number of Ordinance.

X. When an Admiral of any Forraign Nation is met with, he is to be answered with the like number by all the Ships he shall salute; if a Vice-Admiral, the Admiral is to answer him with twelve less; but the Vice-Admiral and Rear-Admiral, and as many of the rest as he shall salute, shall give him the like number: if a Rear-Admiral, then the Admiral and Vice-Admiral, to answer him with two less; but if he shall salute the Rear-Admiral, or any other, they are to answer him in the like number.

XI. When a Man of War, or Merchant-Man of another Nation, or of our own, salute any of the King's Ships, he is to be answered by two less.

XII. When any of the Captains of His Majesties Ships shall have occasion to salute any of the Kings Castles, he is to give two Guns less than they are directed to give upon saluting their Admiral or Commander in Chief, as aforesaid: But this extends only in time of Peace, for if War is begun, no Guns ought to be fired in Salutes, unless to the Ships or Castles of some Forraign Prince or State in Amity.

XIII. Those duties or obligations being laid on *Commanders*, they consist of two parts, the one is that Ancient prescription which the *Crown of England* claims by virtue of the Sovereignty of this *Empire*; the other is but that that respect which is paid as visible marks of *Honour and Esteem*, either to Kingdoms or Persons publicque or private, to whom these several Commands are to be observed; and yet in these which are both innocent and harmless of themselves, we want not those who being empty of all that may be called good, want not malice to start up words, *Wherefore should the lives of Men, even Christian Men, be exposed to death and slaughter for shadows* (as they call them) *the right of salutation or Complement being no other in their opinion.*

XIV. Ad-

XIV. Admitting therefore that the evidence of original Compacts and Rights stand at such remote distances from us, that they are hardly discernable, and that the principle of Civil things, as well as Natural, is sought for in a Chaos or Confusion; so that the evidence of ancient Facts *vestigia nulla retrorsum*, there being no infallible marks of their pre-existence (one step doth so confound and obliterate another) and that time it self is but an imagination of our own, and intentional, not a real measure for actions, which pass away concomitantly with that measure of time, in which they were done, for which reason we talk of ancient things, but as blind Men do of Colours: Notwithstanding prescription is supposed by most to hold out such an evidence, that as they say, \* it ought to silence all Counterpleas in all Tribunals, and by the present allowance which is indulged to it, it either proves a good, or clears a vitiated Title; and this Prerogative it hath in the Civil Constitution of the World, and for quietness sake, that what it cannot find, we grant it a power to make.

\* *Coke Comm. on Littleton, fol. 25.*

XIV. Yet if we examine all this strictly at the two great Tribunals, the external and the internal, and argue the *Jus* of it, as Statesmen and Lawyers do, we can then raise the Argument of it no higher in the external or temporal Court, than only this. *That it is very convenient it should have the effects of Rights, lest Properties and Dominion of things should be uncertain, and by the apparent negligences of time Owners should be punished, and that Controversies may have a speedy end:* States looking more after publique repose and quiet, than after strict virtue; and more after those things which are *ad aliterum*, than that which concerns a Mans own self; for, say they, *The Gods look well enough after their own injuries.* States meddle not so much with great prodigalities, as in petty Larcenies, *our Chiefest Liberty, Priviledges or Prerogative in this World, consisting only in an Uncontroulable Rights, which we have to undo undo our selves, if we please.* Certainly if we plead at the other Tribunal, as Conscientious Lawyers, we must give our ultimate resolution out of that Law, *Qua inciditur non ars, sed animus*: which is not ingraven in Tables of Brass, but in the Tables of our Souls; for the Rules of Law tell us, *Qua principis vitiantur, ea post facto reconvalescant*, and that prescription or usurpation (which is but the lapse of so much time) hath the power to make *Wrong a Right*; yea, to change the morality of an action, and turn quantity into quality: upon the result of all which, taking for granted, what those stubborn people do hold, that in stead of being a Right, or a certain cause or proof of it, it only makes a shadow or an opinion of Right.

*Diorum injuria  
Diti Cura.*

XV. And when we have taken those people by the hand, and

with eagerness run with them to the very bottom and end of the Line, and there find nothing; we are but in *Pompey's* astonishment, when after his Conquest of *Jerusalem*, when he had with such reverence and curiosity visited the *Sanctum Sanctorum*, and found nothing there but a pair of Candle-sticks and a Chair, in which there was no God sitting; yet for all this mistake, he would not (as *Josephus* saith) disorder or rob the Temple, which he took by force of Arms, because *the very Opinion of Religion, hath something of Religion*, (which made *Jacob* accept of *Laban's* Oath by an Idol. So ought not we for defect of giving the causes of the inception of Prescription, or of the Right in Prescription, disorder a State, or be the occasion of setting of two Nations at Enmity; nay, though in conscience we are satisfied that it contains but the opinion or shadow of Right: And as to the involving the lives of the innocent, there is no such thing in the matter, for there is not required any thing which they do not owe, nor are they designed to death; but if the cause be such, that they that are innocent must perish, that is, be exposed to death by their Rulers, because they obstinately will not yield that which is Right, but will involve the lives of their innocent Subjects by force, to defend that which is wrong, such guilty Governours must answer for the defect of their own evil actions: On the other hand, there can be no doubt made, but he that hath an undoubted Right, being a Sovereign, the Subjects partake in the same, and the indignity offered to him, they immediately become partakers in the suffering, for the satisfaction of which they may, yea, are obliged both by the Law of God and Nations to seek reparation (if their Prince shall command) *vi, manu & forti*, by the hazard of their Blood and Lives.

XVI. On the other hand, as War introduces the greatest of evils, *viz.* the taking away of Mens lives, and that which is equivalent to Life; so right Reason and Equity tells us, that it ought not to be undertaken without the greatest cause, which is the keeping of our Lives, and that without which our Lives cannot be kept; or if they should be kept, yet they would not be of any value to us, seeing there may be a Life worse than Death, even Captivity; wherefore as we are forbidden to go to Law for a little occasion, so we are not to go to War, but for the greatest: Now those things that are equivalent to a Mans Life, are such whereto *Almighty God* appointed the same equal punishment as to those guilty of murder, and such were breakers into Houses, breakers of Marriage Fidelity, Publishers of false Religion, and those who rage in unnatural lusts, and the like.

However, before Mens Persons or Goods are to be invaded by War, one of these three conditions is requisite.

1. Necessity, according to the tacite contract in the first dividing of Goods; as hath been already observed.

2. A Debt

3. A Mans ill merits, as when he doth great wrong, or takes part with those who do it.

Against which if any thing is committed, War may be commenc'd, nor is the same repugnant to the Laws of Nature; that is, whether the thing may not be done unjustly, which hath a necessary repugnance to the Rational and Social Nature; among the first principles of Nature, there is nothing repugnant unto War; on the other hand there is much in favour of it, for both the end of War, the conservation of Life and Members, and the keeping and acquiring of things useful unto Life is most agreeable to those principles: And if need be, to use force to that purpose is not disagreeable, since every Living thing hath by the gift of Nature strength, to the end it may be able to help and defend it self; besides, Reason, and the Nature of Society inhibits not all force, but that which is repugnant to Society, that is, which depriveth another of his Right; for the end of Society is, that every one may enjoy his own, this ought to be, and would have been, though the Dominion and Property of Possessions had not been introduced, for Life, Members and Liberty, would yet be proper to every one; and therefore without injury could not be invaded by another; to make use of what is common, and spend as much as may suffice nature, would be the Right of the occupant, which Right none could without injury take away. And this is proved by that Battle of *Abraham* with the four Kings, who took Arms without any Commission from GOD, and yet was approved by him; therefore the Law of Nature was his warrant, whose Wisdom was no less eminent than his Sanctity, even by the report of *Heathens*, *Berosus* and *Orphens*; nor is the same repugnant to the *Hebrew Law* or *Gospel*, as the same is most excellently proved by the *Incomparable Grotius*. \*

*Ulpian. Leg. 1.  
Sect. vim vi. D.  
de vi, et vi armis*

*\* De Jure Belli ac  
Pacis, l. 1. cap. 3.*

XVII. On the other hand, the fear of uncertain danger, as building of Forts, Castles and Ships, and the like, though the former be on Frontiers, the refusing of Wives (when others may be had) the changing of Countries either Barren or Morish, for more fertile or healthfull, which may justly be done: As the case of the old *Germans*, as *Tacitus* relates; so likewise to pretend a Title to a Land, because it was never found out or heard of before, that is, if the same be held by a People that are under a Government; nay, though the Government be wicked, or think amiss of GOD, or be of a dull wit; for Invention is of those things that belong to none,

*Victor de Ind.*  
*rel. 1. m. 31.*

none, for neither is Moral Virtue, or Religious, or Perfection of Understanding required to Dominion; but yet if a new Place or Land shall be discovered, in which are a People altogether destitute of the use of Reason, such have no Dominion, but out of Charity only is due unto them what is necessary for Life; for such are accounted as Infants or Mad-men, whose Right or Property is transferred, that is the use of the same, according to the Laws of Nations, in such case a Charitable War may be commenc'd.

*Victor de Jure*  
*Bell. m. 5, 6, 7, 8.*

XVIII. To prevent all the sad Calamities that must inevitably follow the ungoverned hand in War, Faith must by all means be laboured for; for by that, not only every Common-wealth is preserved, but also that greater Society even of Nations; that once being taken away, then farewell Commerce, for that must be then taken away from Man; for Faith is the most Sacred thing that is seated in the breast of Man, and is so much more religiously to be kept by the Supreme Rulers of the World, by how much more they are exempted from the punishment of their sins here than other Men; take away Faith, and then Man to Man would be, as Mr *Hobbes* observes, even Wolves; and the more are Kings to embrace it, first for Conscience, and then for Faith and Credit sake, upon which depends the Authority of their Government. The Ambassadors of *Justinian* addressed their Speech to *Chosroes* after this manner, *Did we not see you here with our own eyes, and pronounce these words in your ears, we should never have believed that Chosroes the Son of Cabades, would bring his Army, and enter forcibly into the Roman bounds, contrary to his League, the only hope left to us, that are afflicted with War; for what is this, but to change the Life of Men into the life of wild Beasts? take away Leagues, and there will be eternal wars, and wars without end will have this effect, to put Men besides themselves, and divest them of their Nature. If then a safe Peace may be had, it is well worth the releasing of all or many of the injuries, losses and charges; according to that in *Aristotle*, Better it is to yield some of our goods to those that are more potent, than contend with them, and lose all: for the common chances of war must be considered, which if so, the scope of the principal part of this First Book may be avoided, and we let into that of Traffique and Commerce.*

*Procopius Per-*  
*sec. 2.*



## CHAP. I.

Of the various Rights and Obligations of *Owners* and *Partners of Ships* in cases private.

I. Of Navigation in general.

II. Of Owners their several Powers over those Vessels they are Partners in.

III. Where Ships are obliged to make a Voyage before they can be sold; and what may be done when part protest against a Voyage.

IV. The Master how brought in by the Owners, and the reason why in such a manner.

V. Where the Owners ought to be repaired for the Damages of the Master.

VI. Where Ships broke in pieces determine the Partnership as to the Vessel; and where not.

VII. Where a Ship shall be the Builders,

and where only his whose Materials she was crafled with.

VIII. Where Property of the Vessel altered changes not that of the Boat.

IX. A Ship for the act of Pyracie becomes forfeited; yet if bona fide sold, where the Property may be questioned.

X. Money borrowed by the Master, where she same obliges the Owners, and where not.

XI. Where he that obtains an unlawful possession of a Ship, shall answer the full Freight to the Owners.

XII. And where the Owners shall have their Freight though they lose their Lading.

I. IN the precedent Book having observed something of the rights of Persons and of Things in a state of *Nature*, and how necessarily they came at first to be appropriated, and how equitably they are now continued in the possession of those to whom they are consigned by the donation of others, and maintained or destroyed by the equity of those various Lawes which rules and governs them, all which is justified by the Scripture it self; It may not now seem improper to examine the *private causes* changing the same, and of the contingencies and advantages that wait on that which we properly call Commerce.

The Great Creator no sooner had finished his Mighty Work, and given Man that Dominion which he now enjoys as well over the Fish in the Seas, as the Beasts in the Field, he was not forgetful of bestowing on him those things which were necessary for the government and support of the same, creating at the same time Trees which grow as it were spontaneously into Vessels and Canoes, which wanted nothing but launching forth to render them useful for his accommodation, which afterwards he by his divine Genius (inspired by that Mighty One) finding Materials, hath since so Completed and

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Equip

Equipt as to render it the most beautiful and stupendious Creature (not improperly so called) that the whole World can produce, which being not retarded by let of Winds, or other contingent Accidents, submits it self to plow the unknown paths of that vast Elements, to brave all Encounters of Waves and Rocks, to fathom and survey the gmenities of the very World it self, to People, Cultivate and Civilize uninhabited and Barbarous Regions, and to proclaim to the Universe the Wonders of the *Architect*, the Skill of the *Pilot*, and above all, the benefits of *Commerce*, so that it is no wonder at this day to find Nations contending who should surpass each other in the Art of Navigation, and to Monopolize if possible the very Commerce and Trade of the World into their hands; and that, all by the means of this most Excellent Fabrick.

*Arctim. post  
Joan. Faber. in §.  
item executor.  
num. 3. Instit. de  
oblig. quæ ex qua-  
si delict.*

II. Hence it is, that Ships and Vessels of that kind being originally invented for use and profit, not for pleasure and delight, to plow the Seas, not to lye by the walls, to supply those on the Mountains as well as those on the Sea Coasts.

Therefore upon any probable design the major part of the Owners may even *against the consent* though not without the *privity* and knowledge of the rest, Freight out their Vessel to Sea.

If it should so fall out that the major part *prevail* against the Voyage, and but one left that is for the Voyage, yet the same may be affected by that party, especially if there be *equality* in Partnership.

*Leg. Km. C. §. pro  
Socio & p. s. inst.  
& D. eod.*

III. Owners by Law can no ways be obliged to continue their paction or Partnership without sundering; but yet if they will sunder, the *Law Maritima* requires some considerations to be performed before they can so do.

*Leg. in hoc par,  
si conveniat pro  
Sea.*

And therefore if the Ship be newly built and never yet made a Voyage, or is newly bought, she ought to be subject to one Voyage upon the common outread and hazard, before any of the Owners shall be heard to sunder and discharge their parts.

*Bar. & Paul. in  
leg. h. ac distinctio  
§. cum fundum.  
§. locat.*

If it falls out that one is so obstinate that his consent cannot be had, yet the Law will enforce him either to hold, or to sell his proportion; but if he will set no price, the rest may outtrigg her at their own costs and charges, and whatsoever Freight she earns, he is not to have any share or benefit in the same. But if such Vessel happens to miscarry or be cast away, the rest must answer him his part or proportion in the Vessel.

Such Vessels  
when Freight-  
ed out against  
the grain of some  
of the Part-Owners,  
the same is under such  
Provisoes, Cautions and Limita-  
tions as the Law in that case requires.

*Gloss. Leg. si  
socio & juris*

But if it should fall out that the major part of the Owners refuse to let out the Vessel to Sea, there by reason of the unequality they may

not

not be compelled, but then such Vessel is to be valued and sold; The like where part of the Owners become deficient or unable to set her forth to Sea.

IV. The Master of the Vessel is elegable by the part-Owners not by the majority, yet he that is most able is to be preferred, The wisdom of the later Ages have been such, that few have gone out in that condition, but those as have commonly had shares or parts in the same Vessel. In the preferring therefore of a Master, his Ability and Honesty to be considered, since on him rests the charge not only of the Vessel, but of the Lading; their very Actions subjecting the Owners † to answer for all damage that shall be sustained by him or His Mariners, be it in Port or at Sea, to the Lading or Goods of the Merchants or Laders, and they are made lyable as well by the Common Lawes \* of England, as the Law Maritime. †

V. If the Master commits offences either negligently or wilfully, he shall be responsible over to his Owners for the reparation of damage; nor are they bound to joyn, but may sever and sue apart as well by the Common Law † as the Maritime; so likewise if the Ship hath earned Freight, and part of them receive their parts, the rest may bring their Action for their share without joyning with the other.

VI. If a Ship be broke up or taken in pieces, with an intent to convert the same to other uses; if afterwards upon advice or change of mind, she be rebuilt with the same Materials, yet this is now another, and not the same Ship; especially if the Keel be ript up or changed, and the whole Ship be once all taken a sunder and rebuilt, there determines the Partnership *quoad* as to the Ship. But if a Ship be ript up in parts, and taken a sunder in parts; and repaired in parts, yet she remains still the same Vessel and not another, nay though she hath been so often repaired that there remains not one stick of the Original Fabrick.

VII. If a man shall repair his Ship with Plank or other Materials belonging to another, yet the Ship maintaines and keeps her first Owners.

But if a man shall take Plank and Materials belonging to another and prepared for the use of Shipping, and with them build a Ship, the property of the Vessel follows the Owners of the Materials, and not the builder.

But if a man cuts down the trees of another, or takes Timber or Planks prepared for the erecting or repairing of a dwelling house, nay though some of them are for Shipping, and builds a Ship, the property follows not the Owners but the Builders.

VIII. If a Ship be sold together with her tackle, furniture, apparel,

*in leg. utique para. culpa de rei. indic. & leg. arboribus. § navis de usu fruct.*

*Leg. non aliter F. de usu & habi.*

\* 12 H. 6. num. 52.

† Co. 4. Inst. 146. Hill 23 Car. 2. B. R. Morfe versus Siva.

† Naut. Coup. Stab. leg. 1. Sect. 3.

† Hill. 26. 27. Car. 2 in B. R. Stanley versus Ayles.

1 ex. inter stipulatum in §. Sacram. ff. de rer. oblig.

Leg. quod in §. fin. F. de leg.

Leg. Musas ff. de rer. venus.

ff. lib. 6. tit. 1. leg. 61.

Leg. si ex meis. ff. de aq. rer. dom. & leg. si conveniet §. si quis sic ff. de pign. act.

*Leg. Marcellus in*  
*S. armanista ff*  
*de re vindicaz.*  
*\* Trin. 3. f. 2.*  
*B. R. Rolls 1.*  
*part. Abridg.*  
*fol. 530.*

*Bald in leg. cum preponas C. de nautic. & senorenum. 6.*

*Mich. 13. Jac.*  
*in B. R. Sir Rich.*  
*Bingley's Case*  
*Rolls. Abridg.*  
*530.*

*Dig. lib. 14.*  
*tit. 1. §. 17.*

*Bridgeman's Ca-*  
*se, Hobart, fo.*  
*10, 11.*

*Gloss. Affrican.*  
*super eod. leg. &*  
*§.*

*Dig. lib. 6. tit.*  
*1. 62. & 1. 7. tit.*  
*1. 12. §. 1. &*  
*Papinon on the*  
*same Law.*

*Digest. lib. 19.*  
*tit. 2. 61.*  
*Scavala on the*  
*same Law.*

parcel, and all other her instruments thereunto belonging, yet by those words the Ships boat is not conveyed, but that remains still in the Owners; so it is if the Ship be freighted out, and afterwards at Sea, she commits Piracy, the Ship is forfeited, but the Boat remains still to the Owners.

IX. If a Ship commits Piracy by reason of which, she becomes forfeited, if before seizure she be *Bona-fide* sold, the property shall not be questioned, nor the Owners divested of the same.

X. If a Master shall take up Moneys to mend or Victual his Ship where there is no occasion, (though generally the Owners shall answer the fact of the Master) yet here they shall not, but only the Master. But if there were cause of mending the Ship, though the Master spend the money another way, yet the Owner and Ship become liable to the satisfaction of the Creditor; for it were very unreasonable that the Creditor should be bound to take upon him the care of the repairing the Ship, & supply the Owners room, which must be so if it should be necessary for him, to prove that the money was laid out upon the Ship; so on the other hand, it stands with reason that he be sure that he lends his money on such an occasion, as whereby the Masters fact may oblige the Owners, which he can not do otherwise, unless he knows that the money borrowed as necessary for the repair of the Ship, and therefore if the Ship wanted some repairs, and a far greater and Extravagant sum was lent then was needful, the Owners shall not be liable for the whole.

XI. If a man gets possession of a Ship having no Title to the same, by the Law Maritime he shall answer such damage as the Ship in all probability might have earned; and the reason of that is, because the only end of Shipping is the employment thereof.

XII. A Ship is Freightend out, accordingly she receives in her lading pursuant to agreement, afterwards an Embargo happens, and the lading is taken as forfeited, yet the Owners shall notwithstanding receive Freight, for here is no fault in them, but only in the Merchant.

Thus men from their Necessity and Safety having from hollow Trees, nay Reeds, Twigs and Leather (for such were the rude beginnings of those stupendious things we now admire) advanced the Art to that degree, as to render it now the most usefulest thing extant; and as the Mathematicques, Astronomy, and other Sciences hath added to its security, so hath succeeding Ages from time to time provided Privileges and Laws by which it hath always been

regu-

regulated and governed, the which upon all occasions, and in all Courts hath generally had a genuine construction as near as might be to the Marine Customes; and therefore at this day if a Ship be taken away or the Owners dispossessed, they may maintain an Action of Trover and Conversion for 8th or 16th part of the same, as well by the Common Laws of this Kingdom, as the Law Maritime.

## CHAP. II.

### *Master of Ships their Actions considered in reference to cases private and publique.*

- I. *A Master or Skipper his Condition considered in reference to his Interest and Authority generally.*
- II. *Of Goods lost or imbezelled, or any other detriment happens in a Port, who shall answer.*
- III. *The Duty of Masters of Ships, as if they shall see Sayl after an Imbargo, who shall answer.*
- IV. *And of faults ascribed to him before departure in Tempestuous weather, staying in Port, &c.*
- V. *Over-charging or over-lading the Ship above the birth-mark, or receipt of such persons a Ship-board as may hazard the Lading.*
- VI. *Of Lading aboard in the Ships of Enemies, his own proving disabled.*
- VII. *Of Shipping of Goods else-where than at the publique Ports or Keys, and of taking in prohibited Goods.*
- VIII. *Of wearing unlawful Colours or Flags; and of yielding up his Ship cowardly if assaulted, where lyable, and where excused.*
- XI. *Of carrying fictitious Cockquets and Papers, and refusing payment of Customes and Duties.*
- X. *Of setting Sayl with insufficient Tackle, and of taking in and delivering out with the like, and of his charge of Goods till safely delivered.*
- XI. *Of departing without giving Notice to the Customer.*
- XII. *Of Faults committed by Masters and Skippers at Sea*
- XIII. *Rules in Law in the Charging him for Reparation of Damage.*
- XIV. *Of the Power and Authority that the Master hath in disposing Hypothecating or pledging the Ship, Furniture and Lading.*
- XV. *Where Masters are disabled though in necessity to Impawn the Vessel.*
- XVI. *Where they may dispose of Vessel and Lading, and where not.*
- XVII. *What Vessels and Marriners the Master must have for Importing over Exporting out of his Majesties Plantations in Asia, Affrica and America.*
- XVIII. *What Ships may go from Port to Port in England.*
- XIX. *Ships not to import the Goods of any Country but of that from whence they are brought.*
- XX. *What time the Master shall be coming up after arrived at Gravesend, or at any other Port within the Realm, in order to his discharge.*
- XXI. *Of going from Port to Port within the Realm, how provided.*
- XXII. *Of Goods prohibited to be imported from Netherlands or Germany in any Ships whatsoever.*



Leg. 1. de exercit. Ad.

Hob. Rep. fo. 12.  
Bridgeman's Case.

I. A Master of a Ship is no more than one who for his knowledge in *Navigation*, fidelity & discretion, hath the Government of the Ship committed to his care and management, and by the *Common Law*, by which properties are to be guided, he hath no property either general or special, by the constituting of him a Master; yet the Law looks upon him as an *Officer*, who must render and give an account for the whole charge when once committed to his care and custody, and upon failure to render satisfaction; and therefore if misfortune happens, if they be either through negligence, wilfulness, or ignorance of himself or his Mariners, he must be responsible.

\* Drisdall's  
Case.  
Coke lib. 6. fo. 47.

II. If the fault be committed in any Port, Haven, River or Creek, or any other place which is *infra Corpus Comitatus*, the Common Law shall have Jurisdiction to answer the party damaged and not the Admiralty, \* but if the same be committed *super altum mare*, the Admiralty shall have Jurisdiction of the same; yet if it be on a place where there is *divisum imperium*, then according to the flux or reflux the Admiralty may challenge the other of Common right belonging to the Common Law, according to the resolution given.

E. Naut. comp.  
Stat. leg. 1. Sect.  
3. 6. 7.

And therefore so soon as Merchandises and other Commodities are put aboard the Ship, whether she be riding in Port, Haven, or any other part of the Seas, he that is *Exercitor Navis* is chargeable therewith; and if the same be there lost or purloyned, or sustain any damage, hurt or loss, whether in the Haven or Port before, or upon the Seas after she is in her Voyage, whether it be by Mariners or by any other through their permission, he that is *Exercitor Navis* must answer the damage, for that the very lading of the goods aboard the Ship does Subject the Master to answer the same; and with this agrees the Common Law, where it was adjudged, that goods being sent aboard a Ship, and the Master having signed his Bills of Lading for the same; the goods were stowed; and in the night divers persons under the pretence that they were Press-Masters entered the Ship and rob'd her of those Goods, the Merchant brought an action at the Common Law against the Master, and the Question was, Whether he should answer for the same? for it was alledged on his part, That there was no default or negligence in him, for he had a sufficient guard, the Goods were all lockt up under hatches, the Thieves came as *Press-Masters* and by force rob'd the Ship, and that the same was *vis major*, \* and that he could not have prevented the same. And lastly, That though he was called Master or *Exercitor navis*, yet he had no share in the Ship, and was but in the nature of a Servant acting for a Salary. But notwithstanding

\* The which the Civil Law does sometimes allow.

Morse versus  
Slut, Hill. 23.  
Cm. 2. Regis.

ding it was adjudged for the Plaintiff, for at his peril he must see that all things be forth-coming that are delivered to him, let what accident will happen, (the Act of God, or an Enemy onely excepted) but for Fire, Thieves and the like, he must answer, and is in the nature of a Common Carrier; and that though he receives a Sallary, yet he is a known and publique Officer, and one that the Law looks upon to answer, and that the Plaintiff hath his Election to charge either Master or Owners, or both at his pleasure, but can have but one satisfaction.

*ipse eos suo periculo adhibuerit sed non alias prastat quam in ipsum nave dantium datum sit, ceterum si extra navim licet à navis non prastabit, Naut. Camp. Stablit. Leg. 1. Sect. 7. debet exercitor.*

If a Master shall receive Goods at the Wharf or Key, or shall send his Boat for the same, and they happen to be lost, he shall likewise answer both by the Maritime Law and the Common Law.

III. If Goods are laden aboard, and after an Embargo or restraint from the Printee or State he breaks ground, or endeavours to sayl away, if any damage accrues, he must be responsible for the same. The reason is, because his Freight is due and must be paid, nay although the very Goods be seized as *bona contra bandos*.

IV. He must not sail in Tempestuous weather, nor put forth to Sea without having first consulted with his company; † Nor must he stay in Port or Harbour without just cause when a fair wind invites his departure.

V. He must not over-charge or lade his Ship above the birth-mark, or take into his Ship any persons of an obscure and unknown condition without Letters of safe conduct.

VI. Nor ought he to lade any of his Merchants Goods aboard any of the Kings Enemies Ships, (admitting his own Vessels leaky or disabled) without Letters of safe Conduct, otherwise the same may be made prize, and he must answer the damage that follows the action.

Nor shall he come or sneak into the Creeks or other places when laden homewards, but into the Kings great Ports, (unless he be driven in by Tempest) for otherwise he forfeits to the King all the Merchandize, and therefore must answer.

VII. Nor ought he to ship any Merchandize, but only at the Publique Ports and Keys.

He must not lade any prohibited or unlawful Goods, whereby the whole Cargo may be in danger of Confiscation, or at least subject to seizure or surreption.

He may not set sayl without able and sufficient Marriners both for quality and number.

VIII. He

adjudged on a Special Verdict found at the Bar.

*Debet Exercitor omnium nautarum suorum sive liberi sive servi factum prastare, nec immerito factum eorum prastat cum*

*Eod. leg. debet Exercitor.*

*Digest. lib. 9. tit. Leg. 61.*

† *Leg. Olaron. Jud. 2.*

*Stat. 13. H. 6. cap. 3.*

*l. ult. ad. Leg. Rhod. et leg. quom proponas*

*G. de Naut. junior.*

*Stat. 4. H. 4. 20. Leg. sin. parag.*

*si propter necessitatem.*

*Stat. 13. H. 6. cap.*

*19 Eliz. cap. 9. 12 R. & M. 5.*

*1 Jac. cap. 25.*

VIII. He may not use any unlawful Colours, Ensigns, Pennants, Jacks or *Flags*, \* whereby his Ship or Lading may incur a Seizure, or the Cargo receive any detriment or damage.

He must not suffer the Lading to be stolne or imbezled; if the same be, he must be responsible, unless it be where there is *vis Major*, as if he be assaulted at Sea either by Enemies, Ships of Reprize, or Pyrats, there if no fault or negligence was in him, but that he performed the part of an honest faithful and valiant \* man, he shall be excused. Yet it hath been adjudged. That if a Merchant-man lyes in a Port or Haven, and a Pyrat, Sea Rover, or another Thieves enter her and over-power her men, and then rob her, yet the Master must be responsible; but if an Enemy enter and commit the depredation, there the Master is excused.

\* Stat. 16 Car. 2. cap. 8.

*Mor's verius Sine*, 23 Car. in B. R. Rott.

13 R. 2. cap. 2. Leg. 1. Cod. de Navib. non excusand.

*Secund. fin. leg. ult. ad leg. Rhod. & leg. quum propositis C. de Naut. famer.*

*Leg. Oleron. 24. Per Leg. quant. de Pub.*

\* *Coke lib. En. crius*, fo. 3.

\* *Pasch. 26 Car. rul'd at Guild Hall before L. C. J. Hale*, *in v. .... and Peacock*

13 Eliz. cap. 9. 14 Car. 2. c. 11.

IX. He must not carry any counterfeit Cocquets or other fictitious and colourable Ships Papers to involve the Goods of the Innocent with the Nocent.

Nor must he refuse the payment of the just and Ordinary Duties and Port-charges, Customes and Imposts, to the hazard of any part of his Lading; yet if he offers that which is just and pertains to pay, then he is excused.

X. He must not set Sail with insufficient Rigging or Tackle, or with other or fewer Cables then is usual and requisite, respect being had to the burthen of the Vessel; And if any damage happens by the delivery of the goods into the Lighter, as that the Ropes break and the like, there he must answer; but if the Lighter comes to the Wharf or Key; and then in taking up the Goods, the Rope breaks, the Master is excused, and the Wharfinger is liable.

If fine goods or the like are put into a close Lighter and to be conveyed from the Ship to the Key, it is usual there the Master sends a Competent number of his Marriners to look to the Merchandise, if then any of the goods are lost or imbezled, the Master is responsible \* and not the Wharfinger; but if such goods are to be sent aboard a Ship, there the Wharfinger at his peril must take care the same be preserved.

XI. After his arrival at Port, he ought to see that the Ship be well moored and Anchored, and after reladed not to depart or set Sail till he hath been cleared; for if any damage happens by reason of any fault or negligence in him or his Marriners, whereby the Merchant or the Lading receives any damage, he must answer the same.

XII. And as the Law ascribes these things and many more to him as faults, when committed by him or his Marriners, in Ports, so there

there are other things which the Law looks upon to be as faults in him in his Voyage, when done.

As if he deviates in his course without just cause, or steers a dangerous and unusual way, when he may have a more secure passage:

Though to avoid illegal impositions, he may some what change his course; nor may he sail by places infested with Pyrates, Enemies, or other places notoriously known to be unsafe, nor engage his Vessel among Rocks or remarkable Sands, being thereto not necessitated by Violence of Wind and Weather, or deluded by false lights.

*Digest. l. cum in delicto ff. de Probat.*

*Li. 1. Cod. de Navibus non exculand.*

XIII. By the Maritime Law, he that will charge a Master with a fault as in relation to his Duty, must not think that a general charge is sufficient in Law, but he ought to assigne and specify the very fault wherewith he is so charged.

So, he that will infer, that such and such a sad disaster to have happened or been occasioned by reason of some fault in the Mariners, must not only prove the fault it self, but must also prove that that fault did dispose to such a sad event, or that such a misfortune could not have happened without such a fault precedent.

XIV. When Voyages are undertaken, the Master is there placed in by the owners, and they ought to make good the Masters fact and deed. \* And therefore as the whole Care and Charge of Ship and Goods are committed to the Master, it is the prudence of the Owners to be careful who they will admit Commander of their Ship; since their actions subject them to answer the damage, or what ever other act he shall do in reference to his Employ; And therefore he can freight out the Vessel, take in Goods and Passengers, mend and furnish the Ship, and to that effect if need be in a strange Countrey he may borrow Money with advice of his Mariners, upon some of the Tackle, or sell some of the Merchandizer. If part of the Goods shall be sold in such necessity, the highest price that the remainder are sold for must be answered and paid to the Merchant; after which the Merchant must pay for the Freight of those Goods as well as for the remainder, *Leg. Oleron* 1. But if the Ship in the Voyage happens to be cast away, then onely shall be rendred the price that the Goods were bought for.

*\*Recepit saluum fore, utrum si in navem, res missa ei assignata sint, an & si non sint assignata, hoc tamen ipso quod in navem missa sunt, recepta videantur & onerium recepit condicium qua in navem illata sunt, & saluum non solum navigationem prestare debet sed & restorare. F. Navit Camp. lib. leg. 1. Sect. recipit.*

By the Common Law the Master of a Ship could not impawn the Ship or Goods for no property either general or special, nor such power is given unto him by the constituting of him a Master.

Yet the Common Law hath held the Law of *Oleron* reasonable, That if a Ship be at Sea and takes leake, or otherwise wants Victual or other Necessaries, whereby either her self be in danger or

*Leg Oleron. Cap.  
22. Bridgman's  
Case, Hobart,  
fo. 19, 11.*

the Voyage defeated, that in such case of necessity the Master may impawn for Money or other things to relieve such Extremities by employing the money to that end; and therefore he being the person trusted with the Ship and Voyage, may therefore reasonably be thought to have that power given to him implicitly, rather then to see the whole lost.

But a Master for any debt of his own cannot impawn or Hypothecate the Ship, &c. for the same is no wayes lyable but in cases of necessity for the relief and compleating of the Voyage.

*Leg Oleron. Cap.  
1. 12.*

Nor can he sell or dispose of the same without an authority or License from the Owners; and when he does Impawn or Hypothecate the Vessel or Furniture, he ought to have the consent and advice of his Marriners.

XV. And where the Ship is well engaged, she is for ever obliged, and the Owners are concluded thereby, till Redemption.

But in regard Masters might not be attempted to engage the Owners, or in fetter them with such sort of Obligations, but where there is very apparent cause and necessity, they seldom suffer any to go Skipper or Master but he that has a share or part in her; so that if Moneys or provisions be taken up, he must bear his equal share and proportion with the rest.

*Judgment Oleron. Cap. 22.*

The Master cannot on every case of necessity impawn the Vessel or Furniture; for if she be Freight; and he and the Owners are to joyn in the laying in of the provisions for the Voyage, and perhaps he wants money, (a great sign of necessity) yet can he not impawn the Vessel or Furniture, any other or further then for his own part or share in her, the which he may transfer and grant as a man may do an 8th or 5th part in Lands or Houses: But such obligation of the Vessel must be in foreign parts or places where the calamity or necessity is universal on the Vessel.

*Judgment, Oleron. Cap. 3.*

XVI. If the Vessel happens afterwards to be wreckt or cast away, and the Marriners by their great pains and care recover some of the ruines and lading; the Master in that case may pledge the same, the produce of which he may distribute amongst his distressed Marriners in order to the carrying them home to their own Country; But if the Marriners no wayes contributed to the Salvage, then their reward is sunk and lost with the Vessel.

But if there be any considerable part of the lading preserved, he ought not to dismiss his Marriners, till advice from the Laders or Freighters; for otherwise perchance he may be made lyable.

If Merchants freight a Vessel at their own charges, and set her to Sea, and then happens afterwards to be Weather-bound, the Master



ster may impawn either Ship or Lading at his pleasure; or at least such as he could conveniently raise moneys on, rather then see the whole Voyage lost. And if he cannot pawn the Lading, he may sell the same, that is, so much as is necessary; in all which cases his act obliges.

*Leg. Oléron. cap. 22.*

However, Orders and instructions are as carefully to be look'd upon and followed as the Magnate.

XVII. He is not to Import into, or Export out of any the *English* Plantations in *Asia*, *Africa*, or *America*, but in *English* or *Irish* Vessels, or of the Vessels built and belonging to that Country, Island, Plantation or Territory. The Master and 3 fourths of the Marriners to be *English*, upon forfeiture of Ship and Goods. And if otherwise, they are to be look'd upon as Prize, and may be seized by any of the Kings Officers and Commanders, and to be divided as Prizes, according to the Orders and Rules of the Sea.

The like provision on the like penalty is for Goods of *Muscovy*, and of the Dominions and Territories of the great *Czar* or Emperour. So likewise of Currants belonging to the *Ottoman* Territories or Dominions.

All Goods of the Growth of his Majesties Plantations are not to be imported into *England*, *Ireland*, or *Wales*, Island of *Fersey* or *Guernsey*, but in such Vessels as truly belong to Owners that are of *England*, *Ireland*, *Wales*, *Fersey* or *Guernsey*, and three fourths at least of the Marriners are to be *English*, upon forfeiture of Ship and Goods.

Note, In cases of sickness, Death, Captivity, Salves the Clause as to Marriners.

The Goods and Wares of those Plantations, and brought in such manner as aforesaid, must be brought from those very Countries of their several productions and growths, or from the Ports where they are usually Shipped out, on forfeiture of Ship and Goods.

XVIII. No Ship to go from Port to Port in *England*, *Ireland*, *Wales*, *Fersey*, or *Guernsey*, or *Berwick*, unless the Owners are Denizens or Naturalized, and the Master and 3 fourths to be *English*.

That is, those that do not belong to *English*, *Irish*, *Welsh*, or those of *Fersey* or *Guernsey*.

All Owners must swear that their Vessels or Ships are their own proper Ships and Vessels, and that no Forraigner has any share or part in her, and must enter the same, and that she was bought for a valuable consideration; *Bona fide*.

Nor to bring in any goods from any place, but what are of the growth of that very Country, or those places which usually are for the first Shipping, on pain of forfeiture of their Vessel and Furniture.

This does not extend that Masters may take in goods in any part of the *Levant* or *Streights*, although they are not of the very growth of the place, so that they be imported in *English* Ships 3 fourths *English* Marriners. So likewise those Ships that are for *India* in any of those Seas to the Southward and Eastward of *Cabona Speranza*, although the Ports are not the places of their very growth.

12 Car. 2. cap. 13.

Any people of *England* may import (the Master and Marriners; fourths *English*) any goods or wares from *Spain*, *Portugal*, *Azores*, *Madera*, or *Canary Islands*. Nay in Ships that are not *English* built Bullion may be imported; so likewise in those that are taken by way of Prize, *Bona fide*.

But Sugars, Tobacco, Cottens, Ginger, Indicoes, Fustick, or any other dying Wood of the growth of his Majesties Plantations, are to be Shipped, carryed or conveyed from any of the *English* Plantations, are to be carryed to no place in the World, but are to come directly for *England*, *Ireland*, *Wales* or *Berwick*, upon pain of forfeiture of Ship and goods, and the Master is to give bond with one Security of a Thousand pound if the Ship be under the burden of a 100 Tuns, and 2000 l. if above, that upon Landing he brings his Ship directly into *England*, *Ireland*, *Wales* or *Berwick* (the danger of the Seas excepted,) so likewise they are to do the same for the Ships that shall go from the Plantations at the Plantations to the Governour, upon forfeiture of the Ship and Goods.

12 Car. 2. Cap.  
13.

XX. When the Master shall arrive at *Gravesend*, he shall not be above Three days coming from thence to the place of discharge; nor is not to touch at any Key or Wharfe till he comes to *Chesters Key*, unless hindred by contrary Winds, or draught of Water, or other just impediment to be allowed by the Officers; And likewise he or his Purser are there to make Oath of the Burthen, Contents and Lading of his Ship, and of the marks, number, contents and qualities of every parcel of Goods therein laden to the best of his knowledge; also where and in what Port she took in her Lading, and what Country built, and how manned; who was Master during the Voyage, and who the Owners; And in out-Ports must come up to the place of unlading, as the condition of the Port requires, and made Entries on pain of 100 l.

14 Car. 2. cap.  
11.

12 Car. cap. 18.

Nor is such Master to lade aboard any Goods outwards to any place whatsoever, without Entering the Ship at the Custom-House of her Captain; Master; Burthen; Guns; Ammunition, and to what place she intends, and before departure to bring in a Note under his hand of every Merchant that shall have layd aboard any Goods, together with the marks and numbers of such Goods, and be sworn as to the same, on pain of 100 l.

No Captain, Master, Purser of any of his Majesties Ship of War shall unlade any Goods before Entry made, on pain of 100 l.

Note, There is a List of all Forraign built Ships in the Exchequer, and that no Forraign Ship not built in any of his Majesties Dominions of *Asia*, *Africa*, or *America*, after 1. Octob. 1662. and express-

expressly named in the List, shall enjoy the Privileges of a Ship belonging to *England* or *Ireland*, although owned and manned by *English*, except onely such as are taken by way of reprice and condemnation made in the Admiralty as lawful prize; none but *English* and *Irish* Subjects in the Plantations are to be accounted *English*.

If the Master shall have freight from Port to Port within the Realm, he ought to have Warrant for the same, on pain of forfeiture of the goods, and he is to take forth a Cockquet, and become bound to go to such Port designed for, and to return a Certificate from the chief Officers of that Port where the same was designed for, and discharged within 6 months from the date of the Cockquet.

But from the *Netherlands* or *Germany* there may not be imported no sort of Wines (other the Rhenish) Spicery, Grocery, Tobacco, Pot-ashes, Pitch, Tar, Salt, Rozin, Deal-boards, hard Timber, or Olives, Oyl, in any manner of Ships whatsoever.

It might not seem impertinent that this latter part which is abridged as in reference to matters publick should be inserted, for that sometime it may happen that an honest and well meaning Master or Skipper might innocently involve and hazard the loss of his Ship by committing acts against Lawes positive and prohibitory; and though Masters and Mariners *quasales* be not so exquisite as to know all that does belong to their duties, or at least that which the Law layes incumbent on their shoulders, yet for that most of them have some small glimmerings of the same, that such hints in matters publick as well as private may not onely be of some advantage to them, but likewise to Merchants, who always upon the miscarriages of the Masters, prove the greatest sufferers, the offenders, for the most part, proving not sufficiently solvant.

## CHAP. III.

## Of Mariners, their several Offices and Immunities: And of Barratry committed by them.

- I. The several Maritime Officers a Shipboard, and their Charges and Duties.
- II. Of the Masters power and Authority over them, as in relation to punishing or otherwise.
- III. The duty that Mariners owe to each other; and they to the Ship.
- IV. Their attendance requisite when laden; and if detrimens, where to be responsible.
- V. Where Accidents befall them, where they ought to be look't after, and at whose costs.
- VI. The Mariners Oath where requisite to the discharging of the Master.
- VII. What Accidents does destroy, and what not their wages.
- VIII. Where they may joyn all in a Suit for the recovery of their Wages, and where not.
- IX. Of their wages where lyable to an fewer damage.
- X. Where they absolutely lose their wages.
- XI. Of Money or Goods taken up by a Mariner, where it shall be debt, and where a discount of his wages.
- XII. And of their becoming lyable to correction.
- XIII. Barratry in the Mariners, the reason why the Law imputes offences on them to be answered by the Master.
- XIV. In what cases the Master shall become lyable for the actions of his Mariners.
- XV. Of Goods purloyned before they are brought a Shipboard, where the Master is bound to answer, and where not.
- XVI. Of the Antiquity of such Custom.
- XVII. Of Goods brought secretly in a Shipboard if purloyned, where the Master is not made lyable.
- XVIII. Of Caution or forswearing, where the same shall excuse the Master.
- XIX. Where the Master shall be lyable, notwithstanding such Caution.

*Leg. 1. & Pafim. ad leg. Rhod. Et l. 1. Parag. 2. Naut. Camp.*

*Plid. leg. Consol.*

THE Persons Ordinary for sayling in Ships have divers Denominations; The first which is the Master, known to us and by most Nations both now and of old, and especially by the Roman Laws, *Navicularius*, or *Magister Navis*; in English rendred Master, or *Exercitor Navis*; in the *Tutonique*, Skipper; by the Grecians, *Navarchus* or *Nauclerus*; by the Italian, *Patrone*. But this is only to those Vessels that are Ships of Burden and of Carriage: For to Ships of War the principal there is commonly called Commander or Captain. The next in Order of Office to the Master, is he who directs the Ship in the Course of her Voyage, by the French called *Pylote*; by the English and Flemming, *Steersman*; by the Romans, *Gubernator*; by the Italians, *Nochiero Pilotto* and *Navarchus*, as *Gervetus* writes. The third is esteemed the Master's Mate or Companion, chiefly if the Master be Steers-man himself; of old by the Grecian and Roman called *Proreta*; his Charge is to command all before the Mast.

His Successor in order is the Carpenter or Ship-wright, by those

two Nations of old, called *Naupegi* by the latter, by the first *Calaphates*, from the Lyons of one of that Rank sprang that great Emperour *Michael*, surnamed *Calaphates*, who denied not to own the quality of his Father among his Regal Titles. The very name *Calaphate*, the *Venetian* and *Italian* still use to this day.

The Father was of *Phalagonia*, as *Egnatius Volateranus* observes, lib. 23.

The next who succeeds him in Order, is he who bears the Charge of the Ships Boat, by the *Italians* called *Brachierie*; by the *Grecians* and *Romans*, *Garabita*, from *Carabm*, which denotes the Boat of a Ship.

The Sixth in Order, especially in Ships of Burden, is the Clerk or Purser, by the *Italian* called *Servano*, whose duty is the registering and keeping the Accounts of all received in or delivered out of the Ship; for all other Goods that are not by him entred or taken into charge, if they happen to be cast over-board in storm, or are stolne or imbezled, the Master answers them not, there being no obligation on him by Law for the same; his duty is to unlade by day, not night.

*Ill Consolato* & per Stat. 14. Cap. 11.

The 7th a most necessary Officer, as long as there are aboard belies, sharp stomachs and provision, called the *Cook*.

The 8th is the Ships Boy, who keeps her continually in Harbours, called of old by the *Grecians*, *Nauphylakes*; by the *Italians*, *Guardiano*: These persons are distinct in offices and names, and are likewise distinguished in their hyres and wages; The rest of the Crew are under the common name of Marriners, by the *Romans* called *Nautas*; But the *Tarpollians*, or those Youths or Boyes that are Apprentices obliged to the most servile duties in the Ship were of old called *Mesonautas*.

*Budeum ad leg. 1. Naut. Cap. 10.*

II. The Master hath the supream Rule a Shipboard, and by that means his power and authority is by Law much countenanced, especially in the keeping his Crew in peace so long as they eat his bread; and if a Marriner shall happen to be bruised or hurt in doing his duty and service, the Master \* is to take care that he be carefully lookt after in order to the procuring his recovery; and if it be occasioned by the miscarriage of another a shipboard, he may refund the damage out of his wages, but still remembring who gave the first assault.

\* Per leg. *Oleoron*. Chap. 6.

Per Leg. 1. de exerc. act. & 1. in fin. *Naut. Cap.*

If it happens that the Master commands his Boat to be manned out, and it so happens that the same is out of Order, or unfit to take the Sea, the Tewes, or other accoutrements being impotent, if the Marriners happen to be drowned, the Master is to repay one whole years hyre to the Heirs of the drowned. Therefore Master ought carefully to view and see that the Boat be fit for men to trust their lives in upon his command.



*Per Leg. Oleron*  
*cap. 14.*

If a Marriner shall commit a fault, and the Master shall lift up the Towell 3 times before any Marriner, and he shall not submit, the Master at the next place of land may discharge him; and if he refuses to go ashore, he shall lose half his Wages, and all his Goods within the Ship: If the Marriner shall submit, and the Master will not receive the same, he shall have his whole Wages: Or if the Marriner shall depart the Ship on the Master's command, and the Master happens not to take another, if any damage happens to Ship or Goods, the Master must answer.

*Per Leg. Oleron,*  
*Cap. 13. as per*  
*Leg. Denmark.*

III. Marriners must help one another at the Sea and in Port; if they refuse, upon the Oaths of his Fellowes, he loseth his wages. None of the Crew must or ought to leave the Ship without leave of the Master when she comes to a Port, or rides at Anchor, but always constantly to wait upon her till they are discharged, or have leave, at least half to be left a ship-board.

*Leg. nemo de*  
*Reg. jur. & leg.*  
*picumque de in*  
*jur. voc.*

A Marriner may not carry out of the Ship above one meals meat, but drink not a drop; and when a shipboard, ought not to be there arrested for debt, but onely so much of his wages in the hands of the Master attached: yet this is doubted if it be not on a sworn debt, that is, a Judgment or Sentence, or a penalty to the King.

They ought not to depart from a Shipboard when once admitted into their full pay, (which is always when they break ground,) without license of the Master; and before they may so do, they are to leave a sufficient number to guard the Ship and Decks.

*Leg Oleron C. 5.*

IV. If the Ship breaks ground, and is set sayl, if after she arrives at her desired Port, their full pay continues till she returns; nor may they in any wise depart from a shipboard without leave or license of the Master; if they do, and any disaster happens, they must answer: yet at such Port if the Vessel be well moored and Anchored with two Cables, they may go without leave, yet so as they leave a sufficient number behind to guard the Decks: but then their return must be in due season, for if they make a longer stay, they must make satisfaction.

*Leg. Oleron. C. 7.*

V. If Marriners get drunk and wound one another, they are not to be cured at the charge of the Master or Ship; for such Accidents are not done in the service of the Ship: but if any of the Marriners be any wayes wounded, or do become ill in the Service of the Ship, they are to be provided for at the charges of the Ship; and if they be so ill as not fit to travail, they are to be left ashore, and to take care he hath all accommodations of humanity administered to him: and if the Ship is ready for a departure, she is not to stay for him; if he recover, he is to have his full wages, deducting the Masters charges which he laid out for him.

VI. In

VI. In case of Storm if Goods are cast over-board for lightning the Ship, the Oaths of the *Marriners* who swearing that it was done for the preservation of the Vessel and the rest of the Lading, the same shall discharge the Master.

*Leg. Oleron.*  
*Cap. 11.*

So Goods damaged at Sea, are cleared by the Oath of the Master and *Marriners*, by the Laws of *Oleron*.

To assault the Master a shipboard, is a Crime that subjects the *Marriner's* hand to be cut off, unless he redeems at 5. *Silz*.

*Leg. Oleron.*  
*Cap. 10.*

VII. If a Ship happens to be seized on for Debt or otherwise to become forfeited, the *Marriners* must receive their wages, unless in some cases where the wages is forfeited as well as the Ship; As if they have Letters of Mart, and instead of that they commit Pyrac, by reason of which there becomes a forfeiture of all; but lading of prohibited Goods aboard a Ship, as Wooll, and the like, though it subjects the Vessel to a forfeiture, yet it disables not the *Marriner* of his wages; for the *Marriners* having honestly performed their parts, the Ship is tacitly obliged for their wages: But if the Ship perishes at Sea, they lose their wages, and the Owners their Freight. And this being the Maritime Custom, is allowed by the Common Law as well as the Civil Law.

*Consolat. del*  
*Mare.*

*Trin 7 Jac.B.R.*  
*Abr. Rolls. fo.*  
*530.*

VIII. The Courts at *Westminster* have been very favourable to *Marriners* in order to their suing for wages, for at the Common Law they cannot joyn, but must sue all distinct and apart for their wages.

Yet in the Admiralty they may all joyn, and the Courts at *Westminster* will not grant a prohibition\*: And so it was Rul'd, where one *Jones* a Master of a Ship was sentenc'd in the Admiralty for Wages at the Suit of Poor *Marriners*, a Prohibition being prayed upon a suggestion that the Contract was made at Land, and not *super altum mare*: The Court denyed it, for that he came too late, Sentence being given below against him: Yet if the *Marriners* had onely Labelled, and there had been no Sentence, and the Defendant had prayed a Prohibition as above, yet the Court would have denyed it. And this has been and is usually done.

\* Not but they may, notwithstanding the Resolutions of 3 Car. Cro. 3. Reports which are not now taken to be Law.

*Jones versus the*  
*Poor Marriners.*  
*Winch. Rep.*

But the Court will be very well informed that the Libel is for *Marriners* wages; for some who work Carpenters work and such like labour aboard a Ship, in a Haven or Port within the Realm which is *infra Corpus Comitatus*, (notwithstanding those great and ingenious Objections against it) and must be tryed by the Common Law, and not else where, ) will libel under that Cloak for *Marriners* Wages. But the Court in that case will grant a Prohibition. And so it was done in the like cases.

*Sirwell & al*  
*Owners of a*  
*Ship, versus Lo-*  
*ve & al Mich.*  
*27 Car. in B.R.*

But if a Ship rides at Anchor in the Sea, and the Master sends his

1 Arch. fo. 11.  
Hili. 1 Car. in  
B. R. *Godrey's*  
Case.

Boat a *stoc* for Victuals or other provisions for the Ship, and accordingly the *Provider* or the *Slopp-feller* does bring victuals and provisions aboard; in that case if the contract be made there, it must be sued for in the Admiralty: but if the goods are by the Purser or Marriners contracted for at land, they must sue at Common Law.

IX. If Goods are so imbezeled or so damnified that the Ships Crew must answer, the Owners and after must deduct the same out of their Freight to the Merchants; and the Master out of the wages of the Marriners; for though Freight is the Mother of wages, so is it the very Father of Damage: For before the Marriner can claim his wages out of what the Ship hath earn'd, the Ship must be acquitted from the damage that the Merchant hath sustain'd, by the negligence or fault of the Marriners: And the reason is, for that as the Goods are obliged to answer the Freight, so the Freight and Ship is tacitly obliged to clear the damage; which being done, the Marriners are then let in to their wages.

*Leg. Oleron.*

X. If a Marriner be hired, and he deserts the Service before the Voyage ended, by the Law *Maritime* he loses his wages. And the same Custom at Common Law pleaded, it has been conceived will bar him.

If a Marriner shall commit any wilful or negligent fault, by reason of which the Master, Owners, or the Ship answers damage to the Merchant, an action lyes well against him.

XI. If a Marriner takes up Moneys or Cloaths, and the same is entred into the Purser's Book; by the Custom *Maritime* it is a discount or a receipt of so much of their wages as the same amounts to: and in an Action brought by them for their wages, the same shall be allowed, and is not counted mutual, the one to bring his Action for the cloaths, and the other for the wages.

Pasch. 27 Car.  
in B. R. Capt.  
*Pidgeon ad. off.*  
*Argos.*  
*Leg. Oleron,*  
*Cap. 12.*

XII. A Master of a Ship may give moderate and due Correction to his Marriners, and if they bring an Action against him, he may justify the same at the Common Law; and by the Law of *Oleron*, if a Marriner shall assault the Master, he is to pay 5 *Solz*, or lose his hand.

*Per Leg. Oleron*  
*Cap. 13.*

*Marriners* after they have unladed the Ship, if they demand their wages, and there be any intention of their departure, the Master may detain a reasonable proportion of the same till they bring back the Ship, or give caution to serve out the whole Voyage.

XIII. *Barrary* of the *Marriners* is a Disease so Epidemical a shipboard, that it is very rare for a Master, be his Industry never so great, to prevent; a Span of Villany a shipboard soon spreads out to a Cloud, for no other cause but of that circular encouragement that one knavish Marriner gives to another.

Howe.

However the Law does in such cases impute *offences and faults* committed by them to be *negligence* in the Master; and were it otherwise the Merchant would be in a very dangerous condition.

*Justit. de ob. qua  
ex dilect. §. Fin.*

The Reasons why they ought to be responsible, are, for that the Marriners are of his own choosing, and under his Correction and Government, and know no other Superior a shipboard but himself; and if they are faulty, he may correct and punish them, and justify the same by Law: and likewise if the fact is apparently proved against them, may re-imburse himself out of their wages.

*Pasch. 11 lac. in  
B. R. Hermes  
versus Smith.  
Rolls Abridg.  
530.*

XIV. And therefore in all cases wheresoever the Merchant loads aboard any Goods or Merchandize, if they be lost, imbezled, or any otherwise damaged, he must be responsible for them: for the very lading them aboard makes him lyable, and that as well by the Common Law, as the Law *Maritime*.

*Naut. caup. Stab.  
Leg. 1. Sect. 3, 6  
& 7. Morfe ver-  
sus Glue. Pasch.  
23 Car. 2 in B. R.*

XV. Nay, if his Marriners go with the Ship Boat to the Key or Wharfe to fetch Goods a Shipboard, if once they have taken charge of them, the Master becomes immediately responsible if they steal, lose, damage or imbezle them.

*Gloss. super cod.  
Sect. verb. & ja-  
ctum.*

XVI. The ancient st Record that is found extant, is that in *Edw.* the Third's time, where one brought an Action of Trespass against the Master for the imbezlement by his Marriners of 22 pieces of Gold, Bowe, Sheaf of Arrows, Sword, and other things; And adjudged he should answer. And for that the same is or may be of great moment, accept of a Transcript of the Record, as the same was certified into *Chancery*, in order to have it sent into the *Kings Bench*, to enable the Plaintiff to bring an action upon the same Judgment in any place in *England* where he could meet with the Defendant.

Venerabili in Christo Patri Wmo J. Dei gratia Episcopo  
Episcopo Dni Regis Ed. Cancellar. vel ejus locum tenenti  
huiusmodi, & debori Robertus Spene, Major Wille. Bristol,  
Edwardus Blanchett, & Johannes de Castle-acre Vallibi liberta-  
tem ejusdem Wille. salutem cum Omnia reberentia & honore,  
De tenore & Recordi & processus loquellæ que fuit coram nobis in  
Cur. Domini Regis ibid. sine brevi inter Henr. Pili & Jurda-  
num Menore Magistrum nabis hoc. la Graciane de Bayone in  
plura transgressis, prout per breve Dni Regis nobis directum fuit  
vos inde certificatur, sub sigillis nostris vobis si placer mittimus  
in huius scriptis. Ad placit. ibid. die Martis prior. post  
festum Epiphaniæ Domini anno Regni Regis nunc 24. Henr.  
Pili quer. opt. se. versus Jurdamum Menore Magistrum na-  
bis dicitur in Graciane de Bayone de plura transgressis per pl. etc.  
& inde quer. quod secundum legem & consuetudinem de OLE-

*Brevia Regis in  
Turri London.  
Trin. Anno 24 E.  
3. num. 45. Bre-  
vis.*

RON, unusquisque Magister navis tenetur respondere de quacunque transgre. per servientes suos in eadem fact. & Johannes de Nule & Bartolet de Bonnes Servientes predicti Jurdani Magisteri navis predicti die Mercur. prox. ante festum Omnium Sanctozum Anno Regni predicti Regis Ed. 23. in Mari juxta Britan: in eadem navi de Johanne de Cozumb. servient. predict. Dent. 22. libr. in auro attus Magit. grad. & al' bona & catalla ad valent. 40 l'. ceperunt & asportaverunt injuste et. ad dampnum predict. Dent. 60 l'. & si predictus Jurdanius hoc velit deducere predict. Dent. paratus est verificare etc. Et predictus Jurdanius tenetur & dicit quod lex Oleron. ta lis est quod si aliquis bona et catalla Magistro alicujus navis liberata sunt custodienda, habeat idem Magister pro eisdem vel pro aliqua alia re in eadem navi facta mancip. Illo modo Magi. navis tenetur respondere, non alio modo. Et super hoc petit Judicium. Et predict. Dent. dicit quod unusquisque Magister navis tenetur respondere de quacunque transgressione per servientes suos in navi sua fact. et petit Judicium suum etc. Et super hoc predictae partes habent diem hic die Sabbati prox. post festum s. Hillary prox. futur. ad audiend. judicium suum etc. Ad quem diem predictae partes venerunt et petierunt Judicium suum etc. Et retinet. Retayda et processu predictis in plena Curia Coram Majore et Ballivis et aliis probis hominibus Ville et Magistris et Eschiveris, visum fuit Curia, quod unusquisque Magister navis tenetur respondere de quacunque transgressione per servientes suos in navi sua facta. Ideo consideratum est quod predict. Dent. recuperet dampna sua 40 l'. versus predict. Jurdani pro Cur. tunc et nihilominus idem Jurdani et transgressione predicta in navi.

The Judgment  
in this case is  
according to  
Law, and ought  
not to have been a *Capias*,

for it is not such a *Trespas* as the King is entitled to a *Writ*. *Wils. 2*  
*Cra. 224. Biddle versus Morris, 7 Jac. Co. Entries the same, 147.*

XVII. The Master subject to answer damage, is to be understood in all such cases where the Lading was brought aboard either by his consent or his Purfers: for any other, or such as shall be secretly brought in not being entred in the Purfer's Book, or in the Bills of Lading, the Master is not obliged to see forth-coming, unless it be such Goods as the parties bring into the Ship about them, as Cloaths, Money and the like, as above, those things being seldome entred, yet most commonly are visible, the Master by Law is responsible for.

XVIII. So likewise if a Master forewarn a Passenger to keep his Goods, and that he will no wayes take care of them, and if they be lost or purloyned by the Crew, he will not be obliged to see them forth-

*Lex. 1. in fin.*  
*Naut. Comp. per*  
*lex. itaque de*  
*furtis.*

*Ed. Leg. in fin.*  
*Naut. Comp. et*  
*per lex. itaque*  
*de eod. et c.*



coming; The Master is not there held responsible in case of a loss, especially if there be any thing of an agreement the contrary.

XIX. But if Goods shall be sent aboard a Ship, and the Master shall appoint a Cabin for the same, and deliver the Key to the Lader and tell him he will not be responsible if a loss happens; yet if the Goods are stole, he must notwithstanding make satisfaction: By the Common Law it shall bind a Inn-keeper.

Note. That Goods once delivered to a Master, the Cargo is not subject to be attached in his hands, nor can any Custome whatsoever support the same; for they are in Law as it were bayled to the Ship untill the Freight and all other charges are paid \*; and very much doubted whether an Attachment can be made in London of any Goods as all lying a Shipboard in the Rivers of Thames; (which though the Port of London) notwithstanding Freight and all other charges are paid off.

Barol. & Jusan  
in leg. no. 10. solum  
S. morum de usu  
oper.

Brand versu  
Glassie, Sir  
Francis Moore  
Tinn. 25 Eliz. in  
the Exchequer.  
Pide the same  
Book, Mich. 7  
Eliz. post. Wool-  
ley's case.

## CHAP. VI.

### Of Freight, Charter-parties, and Demorage.

I. The various ways that Ships may be Freight'd at this day.

II. The ancient way of Freightings.

III. How the same is governed upon the various Contrails, and of Accidents happening to Masters or Ladens preventing the Voyag.

IV. Of Ships laden and unladed before the Voyag began; Their becoming disabled, viz. perish in the Voyag before the same is completed.

V. Of Ships departure considered as in reference to Freight and Damage.

VI. Of Freight arising on Trading Voyages, and lost by contingent action, considered by the Common Law, and the Law Maritima.

VII. Of Freight becoming due upon the various ways of Contrail, or general where none was agreed for.

VIII. Of faults arising from the Freight, and end of the dease of the Ship, as

in reference to Freight.

IX. Of faults of Masters arising from taking Goods more than were contracted for; And of being forc'd into Ports in his passage.

X. Passengers dying, the Ships tiels to their Goods and concerns.

XI. The Ship in construction of Law, how far liable to Freight.

XII. Ships taken and retaken in War, whether the same destroys the Contrail.

XIII. Goods become lost without fault of the Ship, whether Freight becomes due.

XIV. Of Freight contracted with persons deficient.

XV. Of Ships contracted for by the month to be paid at the arrival at a Port; Ship is cast away, the Goods saved: whether the Freight ought to be paid.

I. **I**N the *Freighting* of Ships respect is always had to the Ship it self, or else to a certain part thereof.

Again, The Merchants either Freight her by the *Mouth*, or the *Entire Voyage*, or by the *Tun*; for it is one thing to Freight a Ship, and another thing to take certain *Tunnage* to Freight.

So also it is one thing to be a Cape-Merchant, another to be an under Freighter.

21 E. 3. Cottons  
Abridgment of  
the Parliament  
Records, fo. 63.

II. There was of old another way of Freighting, which was when the Merchant agreed with the Master for a Sum certain to convoy the Goods ensur'd against all peril; such were to be responsible if any detriment or loss happened: but that is now become obsolete.

Naut. Canpo.  
stab. &c. Leg. 1.  
§. quamcumque  
rim.

Si quis navem  
condukerit in-  
strumenta confi-  
gnata sumo, Pe-  
kicns Com. ad  
leg. Rhod. Ari.  
20.

Per Leg. Naval.  
Rhod. Artic. 19.

III. *Freight* is governed generally by the contract, and varies according to the agreement, reduced generally into a Writing commonly called a *Charter-party*, executed between the Owners and Merchant, or the Master in the behalf of himself and Owners, or himself and the Merchant, or between them all.

The Master or Owners generally Covenant to provide a *Pylott* and all other Officers and Mariners, and all other things necessary for the Voyage; and for the taking in and delivering out of the Lading.

If there be an agreement and *earnest*, but not writing, if the same be broke off by the Merchant, he loseth his *earnest*, but if the Owners or Master repent, they lose double the *earnest*.

Mich. 10. Car.in  
B. R. London  
and Stock's case.  
1 Cro. fo. 279.

Per Leg. item. §.  
Si in leg. in loca.

But by the *Common Law of England* the party damnified may bring his Action of the Case and recover his damages on the agreement.

If a time is appointed by the *Charter-party*, and either the Ship is not ready to take in; or the Merchant not ready to lade aboard, the parties are at liberty, and the party damnified hath his remedy against the other by Action, to recompence the detriment.

If part of the Lading be a Shipboard, and it happens some misfortune may overtake the Merchant that he hath not his full Lading aboard at the time, the Master is at liberty to contract with another, and shall have Freight by way of damage for the time that those Goods were aboard after the time limited; for such agreements are of a *Conditional nature precedent*, a failer as to a compleat Lading will determine the same, unless afterwards *affirm'd by consent*. And though it be no prudence for every Merchant or every Master to depart from the Contract if it should so fall out that the Agreement as to the Lading is not performed according to the *Charter-party* or agreement, (seldome ever done if any part be aboard) yet it is the highest Justice, that Ships and Masters should not be infettered but free; for

for otherwise by the bare lading of a *Cask* or *Bale*; they might be defeated of the opportunity of *Passage* or *Season* of the year.

So on the other hand, if the *Vessel* is not ready, the *Merchant* may Ship aboard in another *Vessel* the remainder of his Goods, and discharge the first Skipper, and recover damages against the Master or Owners for the rest: And this is grounded upon the like reason as the former.

Mich. 10 Car. in  
B. R. *Langdon*  
and *Stocks* case.  
Cro. 1. part. 279.

And therefore by the *Law Maritime*, chance or some other notorious necessity will excuse the *Master*; but then he loseth his Freight till such time as he *breaks ground*: And till then he sustains the loss of the Ship.

Per Leg. *Sex*  
*conducta* & *leg.*  
*sic* item *fundus* &  
*leg.* hac distinctio.

But if the fault be in the *Merchant*, he then must answer the *Master* and the *Ships* damage, or else be lyable to entertain the *Ships Crew* ten days at his own Charge; but after that, then the full Freight: and if any damage happens afterwards, the *Merchant* must run the risque of that, and not the *Master* or *Owners*. But by the Common Law, so long as the *Master* hath the Goods a shipboard he must see them forth-coming.

Per Leg. *Oleron*  
Cap. 21.  
*Artis.* 25. *Leg.*  
*sum* *Navalium*.  
*Art.* 29. *cap.*  
*Rich.* *ver/us*  
*Kneeland*, *Cro.*  
2. part.

IV. If Goods are fully laded aboard, and the Ship hath *broke ground*, the *Merchant* on consideration afterwards resolves not on the *adventure*, but will unlade again; by the *Law Maritime* the Freight seems deserved.

Ad Leg. *Rhod.*

But if the Ship in her Voyage becomes *unable* without the *Masters* Fault, or that the *Master* or Ship be Arrested by some Prince or State in her Voyage, the *Master* may either mend his Ship, or Freight another.

*Judg.* *Oleron*.  
*Leg.* ult. ad *Rhod.*

But if the *Merchant* will not agree to the same, then the Freight becomes due for so much as the Ship hath earned: For otherwise the *Master* is lyable for all damage that shall happen. And therefore if that Ship to which the Goods were translated perish, the *Master* shall answer; but if both the *Ships* perish, then is he discharged.

*Digest.* *Paulus*.  
l. 14. 2 §. 10.

But if there be extream necessity, as that the Ship is in a sinking condition, and an empty Ship is passing by or at hand, he may translate the Goods; and if that Ship sink or perishes, he is there excused: but then it must be apparent that that Ship seem'd *probable* and *sufficient*.

V. If a set time be fixed and agreed upon between the *Merchant* and the *Master* wherein to begin and finish his Voyage, it may not be altered by the *supra Carro* without special Commission for that purpose.

*Leg.* qui *Roma*  
§. *Callimachus*.  
ff. de verb. obl.

If a *Master* shall weigh Anchor and stand out to his Voyage after the time convenanted or agreed on for his departure, if any damage hap-

happens at Sea after that time, he shall refund and make good all such misfortune.

*Arg. Alex. & Faxon in dict. §. Callimachus.* If it is agreed that the Master shall sayl from London to Leighorne in two Months, and Freight accordingly is agreed on, if he begins the Voyage within the two months, though he does not arrive at Leighorne within the time, yet the Freight is become due.

*Leg. Relegati ff. de panis & Le. ult. ff. de Sep. viis.* VI. If a Ship is Freightred from one Port to another Port, and thence to a third, fourth, and so home to the Port from whence she first sayled, (commonly called a *Trading Voyage*) this is all but one and the same Voyage, so as it be in conformity to the *Charterparty*.

*Trin 9 Jac. in C. B. Rott. 638. Bright versus Cooper, Brown-son 1. part.* A Merchant agrees with a Master, That if he carries his Goods to such a Port, he will then pay such a Sum; in the Voyage the Ship is assaulted, entred and robb'd by Pyrats, and part of her Lading taken forth, and afterward the remainder is brought to the Port of discharge, yet the sum agreed upon is not become due; for the Agreement is not by the Master performed.

But by the Civil Law this is *vis major*, or *casus fortuitus*, there being not default in the Master or his Mariners, and the same is a danger or peril of the Sea, which if not in Navall Agreement expressd, yet is naturally implied: For most certain had those Goods which the Pyrats carried away in stress of weather, *Navis levanda causa*, been thrown over-board, the same would not have made a disability as to the Receipt of the sum agreed on; for by both the Common Law, and the Law *Maritime*, the act of God, or that of an Enemy shall no wayes work a wrong in actions private.

*Co. 1. part. 97. Shelley's case. Remiger and Fogassas case. Plowden Com. But a Pyrat is not an Enemy. Vide Chap. Pyraty. Leg. Si quis Cod. de Justis. & sub. tit.* VII. If a Ship be Freightred by the Tun, and she is full laded according to the *Charterparty*, the Freight is to be paid for the whole; otherwise but for so many Tun as the Lading amounted to.

If Freight be contracted for the Lading of certain Cattle or the like from Dublin to *West-Chester*, if some of them happen to dye before the Ships arrival at *West-Chester*; the whole Freight is become due as well for the dead as the living.

*Arg. Leg. Scio ff. de annis legatis & leg. illis liberis in fin. ff. de condi. & de mon. Arg. 7. Leg. qui operas & leg. si ades §. cum quidam & §. fin. ff. locati.* But if the Freight be contracted for the Transporting them, if death happens, there arises due no more Freight then onely for such as are living at the Ships arrival at her Port of discharge, and not for the dead.

If the Cattle or Slaves are sent aboard, and no agreement is made either for lading or transporting them, but generally, then Freight shall be paid as well for the dead as the living.

If Freight be contracted for the transporting of Women, and they

they happen in the Voyage to be delivered of Children on Ship-board, no Freight becomes due for the Infants.

The *Charterparty* does settle the Agreement, and the Bills of Lading the contents of the Cargo, and binds the Master to deliver them well conditioned at the place of discharge according to the contents of the *Charterparty* or Agreement; and for performance, the Master obliges himself, Ship, Tackle and Furniture to see the same done and performed.

If Goods are sent aboard generally, the Freight must be according to Freight for the like accustomed Voyages.

If a Ship shall be Freightied and named to be of such a Burden, and being Freightied by the Tun shall be found less, there shall no more be paid than onely by the Tun for all such Goods as were laded aboard.

If a Ship be Freightied for two hundred Tuns or thereabouts, the addition of *thereabouts*, is commonly reduc'd to be within 5 Tun more or less, as the moiety of the number *Ten*, whereof the whole number is compounded.

If a Ship be Freightied by the great, and the burden of it is not express'd, yet the sum certain is to paid.

VIII. If the Ship by reason of any fault arising from the Freighter, as lading aboard prohibited or unlawful Commodities, occasions a detention, or otherwise impedes the Ships Voyage, he shall answer the Freight contracted and agreed for.

If a Ship be Freightied *out and in*, there arises due for Freight nothing till the whole Voyage be performed. So that if the Ship dye or is cast away coming home, the Freight outwards as well as inwards becomes lost.

IX. If a Master Freights out a Ship, and afterwards secretly takes in other Goods unknown to the first Laders, by the Law *Maritime* he loses his Freight; and if it should so fall out that any of the Freighters Goods should for safety of the Ship be cast over-board, the rest shall not become subject to the Averidge, but the Master must make good that out of his own purse: But if the Goods are brought into the Ship secretly against his knowledge, it is otherwise; and Goods so brought in, the same may be subjected to what Freight the Master thinks fitting. *Consol. del Mare.*

If the Ship puts in to any other Port then what she was Freightied to, the Master shall answer damage to the Merchant; but if forc'd in by storm, or by Enemy, or Pyrats, he then must say to the Port conditioned at his own costs.

*Lexed & addit in §. Si quis mulierem ff. locat.*

There are 3. Bills of Lading alwayes made, the one to be sent over Sea to him to whom the Goods are assigned to, the other for the Master, and the last for the Merchant or Lader.

*Leg. penult. §. novem F. de locat.*

*Trin. 9 Jac. B. R. Bright versus Cowper, Browne-low, 1. part.*

*Leb. Oleron. Leg. Naval. Rhod. Art. 25.*

*Leg. Oleron.*



Generally the touching at several Ports by agreement, imports not a diversity; but a Voyage entire.

X. If Passengers having Goods happen to *decease* a Ship-board, the Master is to *Inventory* their concerns, and the same may a year keep; and if none claim the same, the Master becomes Proprietor defeazable: but the Bedding and Furniture of the parties become the Master and his Mates, and the clothing are to be brought to the *Ship-Mast head*, and there praised and distributed amongst the Crew, as a reward for their care of seeing the body put into Sea.

*Leg. Consolat. del Mar.*

*Bald. in leg. ceteris juris in 4. Q. in verb. Quid ergo Cod. lo. 5.*

XI. The Lading of the Ship in construction of Law is *sacristy* obliged for the Freight, the same being in point of payment preferred before any other Debts to which the Goods so laden are lyable, though such Debts as to time were *precedent* to the Freight; for the Goods remain as it were *bailed* for the same: nor can they be *Attached* in the Masters hands (though vulgarly is conceived otherwise.)

*Hill. 26. 27. Car. 2. in B. R. Stanley versus Ayles.*

Ships deserve *wages* like unto a Labourer, and therefore in the eye of the Law the actions touching the same are generally construed favourably for the Ship and her Owners: and therefore if four part Owners of five shall make up their Accounts with the Freighters and receive their proportions, yet the fifth man may sue singly by himself without joyning with the rest; and this as well by the *Common Law*, as the *Law Maritima*.

*R. 2. Statham Abridg. 54. In Jure Postliminij leg. retor. ex leg. in bello §. 1.*

XII. A Ship in her Voyage happens to be taken by an Enemy, afterwards in Battle is retaken by another Ship in Amity, and restitution is made, and she proceeds on in her Voyage, the Contract is not determined; though the taking by the Enemy divested the property out of the Owners, yet by the Law of War that possession was defeazable, and being recovered in Battle afterward, the Owners became re-invested: so the Contract by fiction of Law became as if she never had been taken, and so the entire Freight becomes due.

*Boyce versus Cole sen' & Cole jun', Hill 26, 27 Car. 2. in B. R.*

XIII. If Freight be taken for 100 Tuns of Wine, and 20 of them leak out, so that there is not above 8 inches from the Buge upwards, yet the Freight becomes due: One reason is, because from that gage the King becomes entitled to Custome; but if they be under 8 inches, by some it is conceived to be then in the Election of the Freighters to sling them up to the Master for Freight, and the Merchant is discharged. But most conceive otherwise, for if all had leaked out, (if there was no fault in the Master) there is no reason the Ship should lose her Freight; for the Freight arises from the Tunnage taken, and if the leakage were occasioned through storm, the same perhaps may come into an Averidge; Besides, In *Burdeaux* the Master stows not the Goods, but the particular Officers appointed for

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that purpose, *quod Nota*. Perhaps a special convention may alter the case.

Most certain, if a Ship Freight by the great be cast away, the Freight vanishes; but if by the Tun or Pieces of Commodity, and she happens to be cast away, afterwards part is saved; doubted whether *pro rata* she ought not to be answered her Freight.

XIV. If a Merchant takes Freight by contracting with a Mariner that is not a Master, he must be contented to sit down without any remedy against the Owners; but perhaps such a Mariner for such act may subject himself to an action.

But if there be a fault committed by a Mariner which was hired or put in by the Master or Owners, there for reparation the Owners become liable.

XV. The Master is not bound to answer Freight to the Owners for passengers if they are found to be unable to pay.

If a Ship by Charterparty reciting to be of the Burden of 200 Tuns is taken to Freight for a sum certain, to be paid at her return; the sum certain is to be paid though the Ship amounts not to that Burden.

If a Ship is Freight after the rate of 20 l. for every month that she shall be out, to be paid after arrival at the Port of London; the Ship is cast away coming up from the Downs, but the lading is all preserved; yet the Freight is become due: for the money arises due monthly by the Contract, and the place mentioned is onely to shew where payment is to be made, for the Ship deserves wages like a Mariner who serveth by the month; and though he dyes in the Voyage, yet his Executors are to be answered *pro rata*: Besides, the Freight becomes due by intendment on the delivery or bringing up of the Commodities to the Port of London, and not of the Ship.

If the Master enters into a Charterparty for himself and Owners, the Master in that case may release the Freighters without advising with the Owners; but if the Owners let out to the Freighters such a Ship whereof J. S. is Master, though the Master Covenant in the same Charterparty and subscribes, yet his Release in that case will not bind the Owners, but the Owners release on the other hand will conclude the Master; And the reason is, for that the Master is not made a proper party to the Indenture. And so it was Rul'd, where an Indenture of Charterparty was made between Scudamore and other Owners of the good Ship called the B. whereof Robert Pisman was Master on the one party, and Vandensene on the other party; In which Indenture the Plaintiff did Covenant with the said Vandensene and Robert Pisman, and bound themselves to the Plaintiff and Ro-

When such a misfortune happens, the Ensured commonly transfer those Goods over to the Assurers, who take them towards satisfaction of what they pay by virtue of their subscriptions.

Co. 4. Inst. 143.

Johannes Locinus lib. 3. Cap. 8.

*Scudamore & al' versus Pitman.* Trin. 29. Eliz. in B. R. cited in Co. 2. Inlt. fo. 673.

*Robert Pitman* for performance of Covenants in 600 l. and the Conclusion of the Indenture was; — *In witness whereof* the said *Robert Pitman* put his hand and seal, and delivered the same; in an action of Debt brought upon the Bond for performance of Covenants, the Defendant pleaded the Release of *Pitman*; whereupon the Plaintiff demurred: And it was adjudged, That the Release of *Pitman* did not barr the Plaintiff, because he was no party to the Indenture. And the diversity in that case was taken and agreed between an Indenture reciprocal between parties on the one side, and parties on the other side, as that was; for there no Bond, Covenant or Grant can be made to or with any that is not party to the Deed, but where the Deed indented is not reciprocal, but is without a *Between, &c.* as *Omnibus Christi fidelibus, &c.* there a Bond, Covenant or Grant may be made to divers several persons.

## CHAP. V. Of Wreck.

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| <p>I. Of Goods wreckt as in relation to the alteration of the property by the Civil Law.</p> <p>II. Of the preservation of Goods Wreckt, and the punishment of those that should add misery to the condition of such persons so distressed.</p> <p>III. Of Goods Wreckt, their preservation according to the Lawes of Oléron, and of England, and of the punishment of those that shall not make restitution.</p> <p>IV. Of Contribution where the Ship perishes, and the Goods are all saved, and where not.</p> <p>V. The King of Great Britain's Privilege as in relation to Wreck and</p> | <p>other Royalties of the Sea.</p> <p>VI. Of Floesam, Jetsam and Lagan, where the King shall have the same, and whether by the grant of Wreck the same passes; and where a Subject may prescribe.</p> <p>VII. Of Ships Wreckt and no Creature in them, yet no Wreck; and of Ships forsaken, whether in Law accounted lost or wreckt, or neither.</p> <p>VIII. Of the Sheriff's duty as in relation to Goods wreckt; and of Owners their times of claiming their property.</p> <p>IX. Wreckt Goods not to pay Customs.</p> <p>X. Of Wreck in the Isle of Wight, not in the Admiral without special words.</p> |
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IN matters of *Wreck* there is as it were a Contract between them which have lost their Goods by such misfortune, and them upon whose Lands the Goods and Merchandize are driven, that the same be restored to them, or those that claym under them. And therefore by the *Civil Law* it is precisely forbid, that no man shall meddle with such Goods as are Wreck'd; and such as are proved to have stolne any thing thereout, are holden for Robbers; for that such Goods being cast on Land and recovered out of the Sea, remains still his who was the Owner thereof, and descend upon his Successor; neither Escheat to the King, neither to any other to whom the King hath granted such Royal Priviledge.

*L. ne quid ff. de incendio, ruina & naufragio.*

*Lex. 44. D. de adq. rer. dom.*

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The reason why the Laws were so strictly declared by the *Romans*, was, for by the *Lawes of Rhodes*, if any Ship had become Wreck, though all the persons were saved and alive, yet the Ship and Goods became seizable by the Lords: But the same being Barbarous, was afterward repealed and abrogated as well by those *Emperours* in their Territories, as here in *England*; the first by the Judgment of *Oleron*, which provided in such misfortune, That if the Merchant, Marriners or Merchants, or any of these escape and come safe to Land, the same was not to be accounted Wreck.

*Per le Iudgments  
Oleron, Cap. 26,  
47.*

The Emperour *Constantine* the Great says in this case, if any Ship at any time by any Shipwreck be driven unto the shoare, or touch at any Land, *Let the Owner have it, and let not my Exchequer meddle with it: for what right hath my Exchequer in another mans Calamity, so that it should hunt after gain in such a woful case as this is?*

*Leg. 1. lib. 11. C.  
de Naufragiis.*

And yet if no Kindred appear within a year and a day, and appearing prove not the Goods shipwrecked to be theirs, the Goods come to the *Exchequer* even by that Law: So much that Law condemns carelessness, which is written *vigilantibus & non dormientibus*. And with this agrees the *Lawes of Oleron*, and the *Lawes of this Land*, as taken out of those *Imperials Lawes*, in that Point, as is conceived.

II. The *Civil Law* was ever so curious and careful of the preserving the Goods of such miserable persons, that if any should steal such, they should pay four-fold to the Owner, if pursued within a year and a day; and as much to the Prince or his *Admiral*: So carefully were, and so exact in requiring restitution, that the very stealing of a Naylor or the worth thereof, obliged the Thief to the restitution of all the remaining Goods. And by the Emperour *Antonius* it was made a Law for such sort of men, that they should be batten'd and banish'd for 3. years; but that was onely for those of a high and Honourable rank: but those that were base and ignoble, should be scourged and sent to the Gallies, or Metal Mines.

*Leg. 1. in or. de incend. ruin. leg. in eum cum auib. seq. de iur. leg. 3. in fin. de incend. ru. naufr.*

And the preventing of help to such shipwreckt persons was punished with the same suffering as a Murderer.

*Leg. pedibus eod.*

The like for those that shall put forth any Treacherous Lanthorn or Light, with intention to subject them to danger or shipwreck, was punish'd with death.

*Arg. leg. succur-  
larij de Eustrod.  
Crim.*

And though no harm happens, yet he may be punished: hence it is that Fishers are forbidden to Fish with Lights in the Night, for fear of betraying of Saylor.

*Per leg. incend.  
ruin. Nua frag.  
Leg. ne piscator.*

Dd 3

But.

And here I cannot omit the Great and Pious Care that His Majesty hath had in his Directions about Light-Houses and Lanthorns, and other special Sea-Marks; but more especially in his Erecting at his own Princely charge that most excellent Light-House near *Goldston* by *Tarmouth*, which both for Height, Curiosity and Form, not inferiour if not excelling all or most in *Christendome*.

*And here I can-*

Per Leg. Olom.  
Cap. 47.

But this good Law does not extend to *Pyrats, Roberts, Sea-Rovers, Turcks*, or other Enemies to the Catholique Faith.

W.stm. 1. cap. 4.  
3 E. 1.  
Naufragia ad  
publicanos perti-  
nents,

Where a Man, Dogg or Catt escapes alive out of the Ship, neither the Ship or other Vessel, nor any thing therein shall be adjudged *Wreck*, but the Goods shall be saved and kept by the *Sheriff, Coroners*, or the Kings Bayliffs, and delivered to the Inhabitants of the Town where the Goods are found; so that if any within a year and a day sue for those Goods, and after prove that they were his at the time of the shipwrack, they shall be restored to him without delay: but if not, they shall be seized by the said Sheriff, Coroners or Bayliffs for the Kings use, and shall be delivered to the Inhabitants of the Town, who shall answer before the Justices for the Wreck belonging to the King.

Where the *Wreck* belongs to another he shall have it in like manner, and if any be attainted to have done otherwise, he shall suffer Imprisonment, make Fine to the King, and yield damage also.

If a Bayliff do it, and it be disallowed by his Lord, the Bayliff shall answer for it if he have wherewithall; but if not, the Lord shall deliver his Bayliffs Body to the King.

Costm. Norm.  
Cap 17.

37 Leg. Naval.  
Ried. & 40.

The Lawes of *Normandy* agrees with this Law.

IV. If the Ship perishes onely, and the Goods are safe, in that case the Goods ought to pay a proportion of a 5th or 10th penny, according to the ease or difficult winning or saving of the said Goods; Rich Goods, as Gold and Silver, and Silk, pay less than Goods of great weight and cumber, being in less danger, unless it were a Wreck going into a Port, for which the Skipper was not bound for, there *contra*, then the Skipper is not to be considered.

V. The King shall have Wreck of the Sea Whales, and great Sturgeons taken in the Sea and elsewhere throughout the whole Realm, except in places priviledged by the King.

Sir Henry Con-  
stables case, Coke  
5 part. 10. 107.

VI. By the grant of Wreck will pass *Flotsam, Jetsam, and Lagan*, when they are cast upon the land; but if they are not cast upon the land, the Admiral hath Jurisdiction and not the Common Law, and they cannot be said Wreck.

*Wreckum Maris*, are such Goods onely as are cast and left upon the land by the Sea.

Faber & alij  
inst. de redivis.  
Sect. pen.

*Flotsam*, is when a Ship is sunk or otherwise perished, and the Goods float upon the Sea.

*Jetsam*, is when the Ship is in danger to be sunk, and for lightning the Ship, the Goods are cast into the Sea, notwithstanding which the Ship perished.

Leg. 7. D. pro  
derelicto.

*Lagan vel Ligan*, is when the Goods which are so cast into the Sea

Sea



Sea before the Ship perishes, being heavy, are by the prudence of the Master of Mariners, who have an intent to save them so sunk; as that they may come at them again, in order to which they fasten a Buoy or other light matter that may signifie to them where they lye, if providence should bring them in a Condition to retake them.

The King shall have *Flosam*, *Fetsam*, and *Lagan* when the Ship perisheth, or when the Owners of the Goods are not known; but when the Ship perisheth not, *contra*.

A man may have *Flosam* and *Fetsam* by the Kings Grant, and may have *Flosam* within the high and low Water-mark by prescription, as it appears by those of the West Countreies who prescribe to have Wreck in the Sea, so far as they may see a *Humber* Barrel.

VII. If a Ship be ready to perish, and all the men therein for safeguard of their lives leave the Ship, and after the forsaken Ship perisheth, if any of the men be saved and come to land, the Goods are not lost.

A Ship on the Sea was pursued with Enemies, the men for safeguard of their lives forsake the Ship, the Enemies take the Ship and spoyl her of her Goods and Tackle, and turn her to Sea; by stress of weather she is cast on land, where it happened her men arrived: It was Resolved by all the Judges of England, That the Ship was no Wreck, nor lost.

VIII. If Goods are cast up as Wreck, and it falls out they be *bona peritura*, the Sheriff may sell them within the year, and the sale is good; but he must account to the true Owners.

Owners clayming the Wreck must make their proof by their marks or Cockets, by the Book of Customes, or by the Testimony of honest men; and if the Wreck belongs to the King, the party may sue out a Commission to hear and determine, and that by the Oaths of twelve men.

Or else he may bring his Action at Law, and make out his proof by *Verdict*; but such Action must be brought *within the year and day*.

Note, *Flosam*, *Fetsam* and *Lagan*, are Goods on or in the Sea, and belong to the King, who by Charter hath granted them to the Lord Admiral.

IX. If Goods are Wreckt on the shoare, and the Lord having power, takes them, he shall not pay Custome. but since adjudged Trin. 24. Car. in C.B. upon a Special Verdict found at St. Edmunds-Bury in Suffolke.

The Admirals of England, *ut magnus Admirallus; Anglia, Hibernia, Wallia, ac Dominiorum & Insularum earundem Villa*

46. E. 3. 15. F.  
N.B. 112. Auth.  
Omnes peregrini  
communis de suc-  
cessionibus ac  
per Leg. Oleron.

Co. 5. part. 107.

Co. 2. Inst. 167.

Leg. 8. D. ad leg.  
Rhed. de jatin.

§ R. 2. Williel-  
mo Fishlake. Co.  
2. Inst. 167. Leg.  
43. § 11. D. de  
furt. Pl. Com.  
466.

E. N. B. fo. 12

DD. Diplo. &  
de Off. Admir.

Left unresolved  
in Moor, fo. 24.

Edmonds-Bury

The very words  
of the Lord Ho-  
ward's Patent,  
in 23 Eliz. in  
Rott. Admir. m.  
10.

1 E. 2. m. 6.  
num. 6.

Pat. 20 E. 2. m.  
10. *intus pro Ed-  
wardo fil. Regis.  
Inquisitiones de  
Anno 47 H. 3.  
num. 32.*

Leg. 3. §. 1. D.  
Naut. Camp. Sr.  
l. 1. §. 3. D. de obl.  
& act. leg. 26. §.  
5. D. mand.

*Quia vis major  
providentiam & industriam humanam superat, hinc culpam praestiterit.*

*Villa Calisa & Merchiarum ejusdem nec non Gasconia Aquitania,  
classium & marium dictorum regnorum Anglia praefectus genera-  
lis, &c. which are the words of their Patents used at this day, do  
claim all Wrecks arising from any of those places, by vertue of their  
Grants.*

X. King Edward the Second in the first year of his Reign, by his Charter granted the Castle of *Carisbrook*, with all the Lands and Tenements in the *Isle of Wight*, formerly belonging to *Isabella Fortibus Countess of Albemarle*, to his great Favourite *Peter de Gaveston* and *Margaret* his Wife, and the heirs of their two bodies begotten, together with sundry other Castles and Lands, and commanded *Nicholas de Bosco*, to put him into actual possession, and likewise commanded *Robert de Sanson* Keeper of the Forrest of *Parkhurst* in that Isle, to be intendent to them for the Farm he had granted him for life for the Custody thereof, which being after soon re- seized into the Kings hands, he granted this Castle with all its Services, and all his Lands in that Isle to *Edward* his Son and his Heirs Kings of *England*, and afterwards for the ascertaining what did of right belong to the same Castle, an Inquisition went out, by which it was found *inter alia quod wrecken maris pertinet ad dictum Ca- strum vales per ann. 4 s.*

So that by the general Patent of the Admiral will not pass the Wreck of this Isle, without special words granted in the Patent.

Note, If the Wreck happened, or was occasioned by reason of any fault or negligence in the Master or Mariners, the Master must make good the loss; but if the same was occasioned by the act of God to avoid an Enemy or Pyrat, and the like; there he shall be excused.

# CHAP. VII. Of Averidges and Contributions.

- I. Of Goods and Merchandize when subject to be cast overboard.
- II. Of the Account rendred of such ejected Goods, and by whom.
- III. Of the Ancient Lawes of England as in reference to such Ejectments.
- IV. What Goods must come into the Averidge, and what are exempt.
- V. The Master discharged by such acts by the Common Law.
- VI. The Ships Geare or Apparel whether within the Averidge.
- VII. The residue of the Goods: where a-cisely obliged to answer the Averidge.
- VIII. Of Goods remaining a shipboard shoyld by reason of the ejecting of others, where subject to the Averidge.
- IX. Where Ship and Lading are both made lyable to the Averidge.
- X. Of misfortunes not subject to an Averidge.
- XI. Where the remainder of the Goods are exempted from the Averidge, and the damage of the ejected Goods falls on the Master.
- XII. Damage to the Ship where the Lading contributes, and the Standard rate in Contributions.
- XIII. The Master becomes a Captive for the redemption of Ship and Lading, where lyable to the Averidge, and where discharged.
- XIV. What Goods are subject to the Averidge.
- XV. Contribution for Pylottage, and where the remaining Goods not subject to Averidge.
- XVI. Rules general for settling the Averidge.

I. **S**hips being Freightred and at Sea, are often subject to storms, in which by the Ancient Lawes and Customes of the Sea, in *Extremam necessitatem* the Goods, Wares, Guns, or whatsoever else shall be thought fit, may in such Extremity be flung over-board; but then the Master ought to consult with his Marriners, who if they consent not, and yet the storm and danger continues, the Master may command notwithstanding, the casting overboard what he shall judge most fitting for the common safety of the rest.

If there be a *super Cargo*, a request ought to be made to him to begin first; but if he refuses, the Marriners may proceed.

II. If the Ship so fortunes as to out-weather the Storms, and in safety arrives at her Port of discharge, the Master and the most of his Crew must swear that the Goods were cast over for no other cause but purely for the Safety of the Ship and Lading. The custome of clearing of that point varies according to the severall Countries or places they arrive at.

III. King William the Conquerour, and Henry the First, made and ratified, this Law concerning Goods cast overboard by Marriners in a Storm, in imitation of the Ancient Rhodian Law; *de jact.*

*Si ego seceres tuas de Rabi ob metum mortis de hoc non potes me implacitare, nam licet alteri damnum inferre ob metum mortis quando periculum evadere non potest. Et si de hoc me*

E c

mesres

*Leg. Rhod. de jact.*

*Leg. Oleron, Cap. 8.*

*Leg. Consolato del Mare.*

*Leg. Wislicens. Artic. 38, 39.*

*Leges Guliel. 1. & H. 1. c. 98. de pactis ad legem Rhodiam. Selden ad Eademurum & Nota & Spicilegium fo. 133.*

*Whelock de Pri-  
scis Anglorum la-  
gibus, fo. 167.*

meſſes, quod ob metum mortis nil feciſſe de complotorai. Et  
ea quæ in navi reſtant dividantur in communi ſecundum catalla,  
et ſi quis jecerit Catalla extra navim quando neceſſitas non exige-  
rit ea reſtituat.

*Le. 9. 1. & 2. ad  
leg. Rhod. & leg.  
Oler. n.*

IV. The Ship arriving in ſafety, the remainder muſt come into  
the *Averidge*, not onely thoſe Goods which pay Freight, but all  
thoſe that have obtained ſafety and preſervation by ſuch *ejection*, even  
Money, Jewels and Clothes, and ſuch like, are not exempted.

But thoſe things which are born upon a mans body, Victuals and  
the like put a ſhipboard to be ſpent, are totally excluded from the  
Contribution.

*Leg. Wiſſiconſ.  
Arin. 20, 21.*

The Maſter ought to be careful that onely thoſe things of the *leaſt*  
*value* and *greateſt weight* be flung overboard.

*12 Jac. in B. R.  
Buſtrof. 2. part.  
290. Bird verſus  
Affcor.*

V. As this Law does take care that this common Calamity ſhould  
be born by all the parties intereſſed by a general Contribution, ſo  
the *Common Law* takes notice of the miſfortune, and makes provi-  
ſion to Indemnifie the Maſter; and therefore if the party Owner of  
ſuch *ejected* Goods ſhall bring an Action againſt the Maſter or Ow-  
ners of the Veſſel, the Defendant may plead the ſpecial matter, and  
the ſame ſhall barr the Plaintiff.

*Leg. 1. f. 28 ex-  
citoria action.*

VI. But if the Ships Gear or Apparel be loſt by Storm, the ſame  
is not within the *Averidge*, but is accounted like unto a Work-  
man breaking or ſpoyling his Tools; So for Goods ſecretly brought  
into the Ship againſt the Maſter or Purſer's knowledge, no Contri-  
bution is to be made, except in the avoiding of a danger, as the flin-  
ging of the *Maſt* overboard, or the ſlipping the *Tow Anchor*,  
or *Boat*.

*I. amiſſa &  
Oleron.*

*Johannes Loc-  
mius l. 2. f. 7. de ju-  
ſſa. & 3. de cor-  
ruptione.*

This order is obſerved generally in the rating the remainder of the  
Goods by way of Contribution.

*Leg. 1. de Del.  
mal. except. &  
leg. Si non ſortem  
de can. ind.*

If they chance to be caſt over-board before half the Voyage per-  
formed, then they are to be eſteemed at the price they coſt; if after,  
then at the price as the reſt or the like ſhall be ſold at the place of  
diſcharge.

*Leg. 1. de Del.  
mal. except. &  
leg. Si non ſortem  
de can. ind.*

VII. As the Common Law looks upon the Goods and Cargo as  
a pawn or pledge for the Freight, ſo the Maritime Law looks upon  
them likewiſe as a ſecurity for the anſwering the *Averidge* and *Con-  
tributions*, and that the Maſter ought not to deliver the Goods till  
the Contribution is ſettled, the ſame being tacitly obliged for the  
one as well as the other. *Ad leg. Rhod. l. 2. Si non conſervatis.*

*Leg. Navis ad  
leg. Rhod. And  
Vitiuſi Commen-  
tary, fo. 235.*

VIII. If through the riſing of the Ship, or the caſting or un-  
lightning the Ship, any of the remaining Goods are ſpoyled either  
with wet or otherwiſe, the ſame muſt come in to the Contribution for  
ſo much as they are made worſe.

IX. If

IX. If it falls out that a Ship entering into a Port or Channel cannot make way, and there by a lightning or disburdning of the Ship, then the Contribution falls two parts to the Lading, and one third to the Ship, except the Ship surpals in value the Lading, or that there is some bad quality in the Ship itself.

Leg. 9. § 3. ad ex. hib.

But to prevent that ambiguous Question, if the party Covenants that the Goods shall be delivered at the Port Covenanted and appointed, then Condition makes Law.

Leg. 1. verse. quod convenit depof.

So for the *Pylossis* Fee and raising of the Ship off ground when there is no fault in the Master.

X. If two Ships happen to Encounter and Cross each other, and the Crew swear their Innocency, Contribution must be made by a just equality; but if one perishes, then can there be no proportion of the loss, so no Contribution. The reason that is given, for that otherwise a Skipper might of purpose set an old weak Ship against a strong Ship, and by that means hedge himself into a Contribution and recompence. However, this bars not the Owners from bringing their Action against the negligent Master, by which means he may recoupe himself in damage, if it happens at Sea, the Action by the *Civil Law* is called *Legis Aquila*.

Leg. quemadmodum parax. Si navis ad leg. Aquila

If such a misfortune happens in the Night at Sea, the party if he will compleatly Arm himself for his recovery, ought to prove, that he made out Light or Fire, or other wayes gave notice by crying or calling out.

Eod. leg. 18. H. 6. num. 52. 3 Inst. fo. 146. Goodwyn versus Tompkins, Noy Rep.

XI. If it falls out the Ship or Vessel by the indiscreet Stowing or Lading the Ship above the Birthmark such *ejection* happen'd, in that case it has been used by the Maritime Lawes no Contribution to be made, but Satisfaction is to be answered by the Ship, Master or Owners.

Legi Sermus 27. § 6. Si. 23. ad leg. Aquil.

XII. If to avoid the danger of a Storm, the Master cuts down the Mast and Sayls, and they falling into the Sea are lost, this damage is to be made good by Ship and Lading *pro rata*: otherwise if the case happens by storm or other Casualties.

Ad Leg. Rhod. leg. 2. §. Si conservatis.

No Contribution is to be paid in case one Ship strike against another whereby damage happens, but full Satisfaction is to be answered the Merchant in case of fault and miscarriage in either; or an equal division of the damage, in case it happen by a *Casualty*, as above.

If a *Lighter* or *Skiff*, or the Ships Boat into which part of the *Cargo* is unladen for the lightning of the Ship perish, and the Ship be preserved, in that case Contribution is to be made; but if the Ship

R. de leg. Rhod. leg. Navis onusta. leg. Navis ad leg. Rhod. de



*fallu. Sir Francis  
Morr, fo 297.*

*Leg. Rhod. de  
Jactu, l. 2. §  
Navis à Pyratib.*

*Moore 297. pl.  
442. Hicks ver-  
sus Pallington.*

*Grotius de In-  
troduct. jur. Holl.  
part. 29.*

*Suetonius jure  
Naut. in the end  
of the 13<sup>th</sup> Chap-  
ter*

*Recheus ad leg.  
Rhod. de jactu. fo.  
196, 197, 198.*

*Grotius Introduct.  
jur. Holl. 3. 29.  
Pinius and  
Pekius Com-  
mentaries on the*

be cast away, and the Lighter, Boat or Skiff be preserved, there no Contribution or Averidge is to be had, it being a Rule, *No contribution but where the Ship Arrives in Safety.*

XIII. If a Ship happens to be taken, and the Master to redeem the Ship and Lading out of the Enemies or Pyrats hands, promises them a certain sum of money, for performance whereof himself becomes a Pledge or Captive in the Custody of the Captor; in this case he is to be redeemed at the costs and charges of the Ship and Lading, and money if there be any in her, are contributory according to each mans interest for his ranlome.

So where a Pyrat takes part of the Goods to separe the rest, Contribution must be paid.

But if a Pyrat takes by violence part of the Goods, the rest are not subject to Averidge, unless the Merchant hath made an exprels agreement to pay it after the Ship is robb'd.

But if part of the Goods are taken by an Enemy, or by Letters of Marque and Reprizal, *contra.*

So likewise in storm, if the same is done for preservation of the remainder.

XIV. In Ejectment the Master or Purser of the Ship shall contribute for the preservation of the Ship, and also the Passengers for such Ware as they have in the Ship, be it Pearls, Precious Stones, and such like; and Passengers that have no Wares or Goods in the ship, yet in regard they are a burthen to the ship, Estimate is to be made of his and their Apparel, Rings and Jewels, towards a contribution of the loss; and generally all things in the ship except the Victualling and Provisions of the ship, and the bodies of men (unless Servants) must bear a proportionable share in the Contribution.

The Estimate being made of the Goods lost and saved, the price is to be set down not for how much they were bought, but how much they might be sold, at the time when the Ejectment was made; and if anything be flung into the Sea and endamaged, and afterwards is recovered again, yet contribution is to be made only for the damage.

XV. Contribution is to be paid for the Pilot's Fee that hath brought a Ship into a Port or Haven for her safeguard, (it being not the place she was designed for) so to raise her of the ground when there is no fault in the Master.

If a Master of a Ship lets out his Ship to Freight, and then receives his compliment, and afterwards takes in Goods without leave of the Freighters; and a Storm arises at Sea, and part of the Freighters Goods are cast over-board, the remaining Goods are not subject to the

the Averidge, but the Master must make good the loss out of his own purse.

The Goods which are lost are to be valued, then the Goods saved are to be estimated, which being known, a proportionable value is to be contributed by the goods saved, towards reparation of the goods *ejected*, or cast over-board.

In which regard is alwayes had, not to what might be got by the Goods lost, but what the intrinsick damage is by the loss of the same; the which are not to be estimated what they might have been sold for, as what they cost or were bought for.

But now the custome is general, the Goods saved and lost, are estimated according as the Goods saved were sold for; Freight and other necessary charges being first deducted.

If there were Plate, Jewels or the like in a Trunk, Chest, Pack or Bale, at the time of their Ejection; if there be a *super Cargo* he ought to give notice by discovering of the same to the Master or Mariners, otherwise he shall be answered in the Contribution no more then the bare extrinsick value appeared to be; but the Assurers will hardly fare so well.

If Contribution shall be settled, and the Merchant will not agree, the Master may detain the Lading, for the same is as tacitly obliged to answer that as the Freight; And if at the Common Law the Merchant should bring an Action, the Defendant shall bar him by pleading the special matter.

If Goods are cast over-board; and afterwards are recovered; Contribution ceases, saving for so much as they are damaged, and made worse by reason of such Ejection.

*Note.* Goods cast overboard to lighten the Ship make no *derelict*.

And though such necessity seems to subject the Lading to Ejection to prevent the ruine and destruction of the persons, yet some Lading seems excepted, and therefore Canon and other Instruments or Provisions consigned to relieve a City, ought not be flung overboard; for in such case the Law imposeth on every subject, that he prefer the urgent Service of his Prince, before the safety of his life.

Laws of *Rhodes*, 236.

*Locinus*, lib. 2. Chap. 2, 9, 10, 11.

The Custome of Places varies this *Modus* of Estimating; the which is done by Merchants and Mariners indifferently nominated by the Court. *Ad Leg. Rhod. §. ult. inst. de rer. divis. & leg. 9 §. ult. de aq. rer. Dom.*

*ff. Ibid. leg. Navis, §. cum autem.*

*Leg. 25. D. de prob. leg. falsus §. Si iactum. D. de furt.*

*Bacon Max. fo. 17. privilegium non valet contra rem publicam.*

## CHAP. VII. Of Policies of Assurance.

- I. *Assurances by whom first introduced.*
- II. *Assurances and the nature of them.*
- III. *How esteemed as by Law.*
- IV. *The various ways of Ensuring; and on what.*
- V. *Assurance when esteemed most dangerous, and of fraudulent Policies.*
- VI. *Of the Receipt of Premio, and the customs of abatement on losses.*
- VII. *Policies that now ensure against all the Accidents of Heaven and Earth.*
- VIII. *A Ship Ensured generally, whether the same includes the Cargo; and whether it is necessary in the Policy to mention the particular Goods.*
- IX. *If the Master is discharged of the damage, whether the Ensurer may be made liable.*
- X. *A Ship Ensured from a Port, and she is burnt before her departure, whether the Assurer are made liable.*
- XI. *Goods Ensured in one Ship, are afterwards in the Voyage put into another, the second miscarries, whether the Assurers are made liable.*
- XII. *A man Ensures more than the value*
- XIII. *of the Cargo, the Customs in such case. A Ship is Ensured from one Port to another, and there to be landed; the Cargo after arrival is sold, and before landing is burnt, whether the Assurers shall be made answerable.*
- XIV. *A Ship Ensured from one Port to (land) being in time of War taken, whether the Assurers shall answer.*
- XV. *Of the Ensurers reckoning after a loss; and what operation the same has by Customs.*
- XVI. *Of the Office created by the Statute of 41 Eliz. what power; of the Jurisdiction claimed by those at Common Law and the Admiralty.*
- XVII. *What power and authority was given by the Statute of 43. Eliz. to that Court.*
- XVIII. *What things it was deficient in; and helped by the Statute of 14. Car. 2. cap. 23. and of their authority and power general at this day.*
- XIX. *Of the advantages that seem to accrue to publique Assurances, different from private ones.*

*In vita Claud.  
Casar, lib. 25.  
c. 18.*

\* *Lex. ff. qui  
Solida cog.  
Grotius de jure  
Bell. ac Pacis,  
lib. 2. cap. 12.  
¶ 3. in fin.*

IT is conceived by Suetonius, that Claudius Casar was the first that brought in this Custome of Assurance, by which the Danger and Adventure of Voyages is divided, repaired and born by many persons, who for a certain sum by the Spaniards called *Premie*, assure Ship Goods or both, or a proportion, according as the Policy is.

IF Assurances are either publique or private; Publique when they are made and entred in a certain Office or Court, commonly called the Office of Assurance in the Royal Exchange in London; and the same are called publique, for that it is free for any man to resort and see what another hath assured upon his Adventure.

Private is, when an Assurance is made, but the Ensured keeps the same secret, not deeming it fit that any should see or know their Cargo or Adventure, or what Premio they have given, or assurance they have made, and the same being never entred in the Office, is known by the name of a Private Assurance.

III. By

III. By the *Common Law* they are both of the same validity, as in reference to obtain Satisfaction from the Ensurers; is loss or damage should happen to the Adventure.

But by the proceedings erected by *Statute of 43. Eliz. Cap. 12.* only those that are entered in the Office of that Court, can be sued or determined there.

IV. *Assurance* are of various sorts, some being to places certain, others general; those that are made to places certain, are commonly upon Goods laden or to be laden aboard outward, and until the same Adventure shall be laid ashore at such a Port.

Or upon Goods laden or to be unladen homeward in such a Ship till the Adventure shall likewise be landed.

Or else upon Goods out and in, with liberty to touch at such Ports as are mentioned in the Policy.

So likewise on Ships that go Trading Voyages, as Round to Cales; and that it shall be lawful after the Ships delivery there, to take in at the same Port another Cargoe, and with that proceed to the *West Indies* or other parts, and back again to Cales, and from thence to London, this Policy being general and dangerous, procures seldom subscriptions.

As Goods and Merchandize are commonly Ensured, so likewise are the Ships Tackle and Furniture, but in regard there seldom happens a Voyage but somewhat is missing or lost, the *Premia* commonly runs higher then for Merchandize.

Assurances may be made on Goods sent by land, so likewise on Hoves and the like.

V. Those Assurances are most dangerous when there are these words inserted *lost or not lost*; which is commonly done when a Ship hath been long missing and no tidings can be had, the *Premia* especially in time of War will run very high, sometimes 30 or 40 per Cent; and though it happens at the thime that the subscription is made the ship is cast away, yet the Assurers must answer.

But if the party that caused the Assurance to be made saw the Ship wrecked, or had certain intelligence, such subscription will not oblige the same being accounted a meer fraud.

So likewise if the Assured having a rotten Vessel shall assure upon the same more then she is worth, and afterwards give order that going out of the Port she should be sunk or wrecked; this will be fraudulent, and not oblige the Assurers to answer.

Afterward convicted by Information for the Fraud. *Term Sancti Hillarij sequen. Litch, lib. 25.*

*Leg. 4. s. D. 24. New. Jan.*

*Johannes Lockmans, lib. 2. cap. 5. §. 5, 6.*

*Santor. p. 3. num. 13. §. 49. §. 99.*

If such Assurance be made in the Office, they then set down the hour when intimation is given of the loss. *Locinins, lib. 2. cap. 3. §. 9, 10.*

*Arthur Stockden of Stockden's Case. Mich. 26. Car. 2. in B. R.*

VI. Few in F. R. *vide*

The Subscription mentions as if the *Premie* had been actually received, but it is seldom done till the adventure is boupt.

*ne qua in nave  
impossuissent, ab  
hostium tempe-  
statibus, vel pa-  
blici periculo of-  
fenti. Negotia-*

*ribus certum lucra propositi suscepit in fidem, si cui quid per tempestatem, aut idcirco, Livius, lib. 23, c. 25. Vide Zalius in Commentario ad Digesta, tit. pro Socio, u. 25.*

\* Sub nomine periculi, de quibus causis, comprehenditur omnis

*casus qui accidit in mari, a tempestate, ab hostibus predonibus, Rapinis, ac vocantur arrestis aliisque modis usitatis & institutis extra fraudem & culpam contrahentium, aut domini mutationis vel novitatis. Grotius de jure Belli, 24.*

*Loquens, lib. 2.*

*cap. 5. §. 7. 9, 10.*

VI. Few or scarce any Ensure the whole Ship, but the subscriptions being for Sums certain, as 50 l. or 500 l. at the *Premie* then current, which when the Adventure is born they receive; but if a loss happens, the *Premie* is deducted together with the usual abatement, so that the Ensured receive much about 80 per Cent. if a loss happens.

VII. The Policies now adays are so large, that almost all those curious Questions that former Ages and the Civilians according to the Law Maritime, nay and the Common Lawyers too, have controverted, are now out of debate; scarce any misfortune that can happen, or provision to be made, but the same is taken care for in the Policies that are now used; for they Ensure against

Heaven and Earth, Strefs of Weather, Storms, Enemies, Pyrats, Rovers, &c. or whatsoever detriment shall happen\* or come to the thing Ensured, &c. is provided for.

VIII. If a Merchant Ensures such a Ship generally, and in the Policy it is expressed of such a Burthen, the Ship happens then to be loaded and after miscarries, the Ensurer shall not answer for the Goods, but onely for the Ship.

It matters not in the Policy whether the particular Wares and Goods are named, but generally upon the principal Wares, and all other Commodities laden or to be laden for the Ensured or for his account, or for any other.

X. If a Ship be Ensured from the Port of London to Calais, and before the Ship breaks ground takes fire, and is burnt, the Assurers in such case shall not answer, for the Adventure begun not till the Ship was gone from the Port of London; but if the word had been, as if from the Port of London; there they would upon such a misfortune have been made liable.

If such an Assurance had been from London to Calais, and the Ship had broke ground, and afterwards been driven by storm back to the Port of London, and there had took fire, the Ensurers must have answered; for the very breaking of ground from the Port of London was an inception of the Voyage.

Note, The Port of London extends from the North Foreland in the Isle of Thanet, over in a Line to the North in Essex, and from thence to London Bridge. Rotulo Statuti 19 Car. 2.

XL. If

XL. If



of XI. If Goods are Ensured in such a Ship, and afterwards in the Voyage it happens she becomes leaky and crazy, and the *super Cargo* and Master by consent become Freighters of another Vessel for the safe delivery of the Goods; and then after her relading the second Vessel miscarries, the Assurers are discharged; But if there be these words, *The Goods laden to be transported and delivered at such a place by the said Ship, or by any other Ship or Vessel until they be safely landed*, then the Ensurers must answer the misfortune.

XII. If a man Ensures 5000 l. worth of Goods, and he hath but 2000 l. remitted, now he having ensured the real Adventure, by the Law Maritime all the Assurers must answer *pro rata*. But by the opinion of some, only those first Subscribers who underwrit so much as the real Adventure amounted to, are to be made lyable, and the rest remitting their *Premio 10s. per Cent.* deducted out of the same for their subscriptions, are to be discharged.

XIII. A Merchant Ensures his Goods from London to Sally, and there to be Landed; the Factor after arrival having opportunity sells the Cargo aboard the Ship without ever unloading her, and the buyer agrees for the Freight of those Goods for the Port of Venice, before she breaks ground, the Ship takes fire, the Assured is absolutely without remedy; for the property of the Goods becoming changed, and Freight being contracted *de novo*, the same was as much as if the Goods had been landed.

And so it is if the Factor after her arrival had contracted for the Freight to another Port, and the Ship had happened to take fire, the Assurers are hereby absolutely discharged for ever.

XIV. If a Ship be Ensured from London to *blank* and being so left of purpose by the Lader to prevent her surprize by the Enemy, in her Voyage she happens to be cast away, though there be private Instructions for her Port, yet the Ensured sit down by the loss by reason of the uncertainty.

XV. After notice of loss, the Ensured; (if he doth think fit) for that he hath Ensured the most of his Adventure, or that he would have the assistance of the Assurers; when there is hope of recovery of the Adventure, he may then make a Renunciation of the Lading to the Assurers, then he comes in himself in the nature of an Ensurer, for so much as shall appear he hath born the Adventure of beyond the value Ensured.

But if the Merchant shall not renounce, yet there is a power given in the Policy for him to travail, pursue and endeavour

That has been much doubted; and opinions of the Court hath generally inclined against the Assurers. *Leg. ult. ad Rhod. Digest. Paulus. l. 14. cit. 2. §. 10.*

*Vide Grocius Inrod. jur. Holl. 212. 23.* And indeed is more the Customs of Merchants than Law.

*Locinius lib. 2. cap. §. 9.* And by the Lawes of *Commerce*, there is a time allotted after the Ships arrival at her Port how long the adventure is to be born by the Ensurers, which is about 15 dayes. *Art. 13. Affecur. Answer.* Case of Monsieur Gourdan, Governour of Calais. Anno 1589. *Locinius, lib. 2. cap. §. 8.*

your a recovery (if possible) of the Adventure after a misfortune to which the Assurers are to contribute, the same being but a trouble to give ease to the Assurers.

If prohibited Goods are laden aboard, and the Merchant ensures upon the general policy, which always contains these words; *Of the Seas, Men of Warr, Fire, Enemies, Pyrats, Rovers, Thieves, Jettisons, Letters of Marr, and Covinants, Arrests, Restraintment and Detainments of Kings and Princes, and of all other persons; Barratry of the Master and Mariners, and of all other perils, losses and misfortunes whatsoever they be, and howsoever they shall happen to come, to the hurt and detriment of the Goods and Merchandize, or any part or parcel thereof*; whether if such Goods be lawfully leized as prohibited goods; the Ensurers ought to answer. It is conceived they ought not; and the difference hath been taken, where Goods are lawful at the time of Lading to be imported into that Country for which they are consigned for, but by matter *ex post facto* after the lading they become unlawful, and after arrival are seized, there the Assurers must answer, by virtue of the Clause, *And all other perils, &c.* But if the Goods were at the time of lading unlawful, and the Lader knew of the same, such Assurance will not oblige the Assurers to answer the loss, for the same is not such an Assurance as the Law supports, but is a fraudulent one.

*Sub nomine periculi, de quo fit contractus, comprehenditur omnis casus qui accidet in mari, à tempestate, ab hostibus predominantibus reipublicis ut vocant auctores alijsque modis usitatis circa fraudem, et culpam contrahentium aut domini mercium vel navis.* Grotius de iur. p. 24. In hoc contractu bona fide versandum est, ut auctor ultro citroque obligationis postulat. Locinius, lib. 2 cap. 5. §. 8.

† 12 Car. 2. cap. 32.  
14 Car. 2 cap. 7.  
18 \* 12 Car. 2. cap. 18.

So it is if a Merchant will Freight out Wooll, Leather † and the like, or send out Goods in a Forraign bottome \* and then make a Policy, the Ship happens afterwards to be taken, by reason of which there becomes a forfeiture of Ship and Lading; the Ensurers are not made subject to answer the damage: for the very Foundation was illegal, and the law supports only those Assurances that are made *bona fide*, for if otherwise, and men be could Ensured against such actions they would destroy Trade, which is directly to thwart the institution and true intentions of all Policies.

But if Goods should happen to be lawfully Ensured, and afterwards the Vessel becomes disabled, by reason of which they relade by consent of the *super Cargo* or Merchant into another Vessel; and that Vessel, after arrival, proves the Ship of an Enemy, by reason of which the Ship becomes subject to seizure: yet in this case the Ensurers shall answer, for that this is such an accident as is within the intention of the Pollicy.

*Ristoribus ad lex. contractus. 23. de Reg. iur. cap. 18. pag. 236, 237. Sijpman dicto loco num. 335.*

Several men lade aboard Salt, without distinction; not putting them in Sacks, and the like; the Ship arrives, the Master delivers to their Principals according to their Bills of Lading as they come one by one, it falls out that some of the Salt is waste or lost by reason of the dampness of the Ship, and that the two last men cannot receive their proportion: There are in this case these things to be considered.

Hill. 11. Jac. in  
C. B. *Lastlow*  
and *Tamlinsons*  
Case, *Holart*  
88.

1. Whether the Master is bound to deliver the exact quantity?
2. Whether those that have received this loss can charge the Assurors?
3. Whether the Assurors can bring in the first men for a contribution; they having their Salt delivered to them completely.

Certainly the Master is not bound to deliver the exact quantity, nor is he obliged to redeliver the very specifical Salt, but only as men are to repay Money or Corn by the distinction in a Bag or Sack, and out of them; but if the fault was in not pumping, keeping dry his Deck, and the like, there is though perhaps there may be special agreement.

*Inst. in pr. quib.*  
*mod. re. contrab.*  
*ob. te. l. 2. Si ceri.*  
*peti.*

Besides, there is a peril of the Sea against which the Master could not prevent, and of necessity he must deliver to one first before another.

*Leg. quod conve-*  
*nit de verb. ob.*

As to the second, It is no question but that the Assurors shall answer. But whether they shall bring in the first men for contribution, may be some doubt.

It has been conceived by some, that they ought not, for they delivered their Salt to the Master *tangam in Creditum*, and was not to expect the redelivery of the specifical Salt: Besides, the Master must of necessity deliver to one man before another.

*D. Leg. in mo-*  
*nare.*

But by others it has been conceived they ought to contribute *per ratione*, for as Goods of necessity some must be stowed in the Hold, and that such Goods seldom fail without a peril of the Sea; so the rest must of necessity contribute to that misfortune, and so make no distinction.

The Bills of Lading are very useful to settle the difference between the Assuror and Assured, of which there are 3. parts, one sent over Sea; the other left with the Master; and the last remaining with the Lader.

XVI. The Office of Assurance was Erected by the *Statute of 43 Eliz. Cap. 12.* which reciting, That whereas differences growing upon Pollicies of Assurances had been ordered by discreet Merchants approved by the Lord Mayor, who did speedily decide those causes, untill that of late years divers persons did withdraw themselves from that Arbitrary course, and have sought to draw the parties Assured to seek their Moneys of every several Assurer by Suits Commenced in her Majesties Court to their great Charges and delay; whereupon it was Enacted, That the *Chancellor or Keeper* for the time being should issue forth a standing Commission (to be renewed yearly, or as often as to him shall seem meet,) for the hearing and determining of all such causes arising on Pollicies of Assurance as shall be entered in the Office of Assurance in London.

The Judges or Commissioners appointed are the Judges of the Court of Admiralty, the Recorder of London, two Doctors of the Civil Law, two Common Lawyers, 8 grave and discreet Merchants; or to any 5 of them; and that they or the greatest part of the Commissioners have power to Hear, Examine, Order and decree all such causes in a brief and summary way without formality of pleading.

They have power to summon the parties, examine witnesses upon Oath, commit to prison upon refusal of obedience to their Decrees; they are to meet once a week at the Assurance Office, or some other convenient publique place, and no Fees at all to be exacted by any person whatsoever.

There lyes an Appeal from their Sentence to the Lord Chancellor or Lord Keeper (but the party must deposite the moneys decreed, and then (though the party be imprisoned he may be discharged) and then it lyes in the Lord Chancellors or Keepers Breast to affirm or reverse, and to award the party assured double costs.

No Commissioner being party Assurer can act by virtue of this Commission, nor untill he hath taken his Corporal Oath before the Mayor and Court of Aldermen, To proceed uprightly and indifferently between party and party.

XVII. This was a good Act, had it been as carefully penned as was intended; for there were many things in which this Act did not extend to.

First, Any man may at this day make a private Policy notwithstanding this Act, which is as good and effectual in Law to all intents and purposes, as one made and entered in the said Office; and that such a Policy might and may be now sued at the Common Law.

Secondly, The number of Commissioners being so great that there could be no Court without 5. at the least; and without a Court they neither could summon parties or examine witnesses, and that was very difficult to get.

Thirdly, If the parties or witnesses refused to appear, they had no power to punish the party for the delay, with costs or otherwise, which was very mischievous.

Fourthly, No Commissioner could sit before he was sworn: Commissions and the Commissioners being often renewed, it was a trouble to be attending a Court of Aldermen, which was difficult sometimes of the year to get.

Fifthly, Though they had power to commit the party who refused to obey their Decree, yet they had no power to make any Order against the Ship.

Which matters being taken into consideration, it was Enacted, 14 Car. 2.  
cap. 23.  
That 3. Commissioners, whereof a Doctor of the Civil Law and a Barrister of 5. years standing to be one should make a Court, and to act as any 5. before might have done.

They have likewise power now given them to summon parties and witnesses, and upon contempt or delay in the witnesses upon the first summons and tender of reasonable charges: and in the parties upon the second summons to imprison offenders or give costs.

Every Commissioner is now to take his Oath before the Lord Mayor to proceed uprightly in the execution of the said Commission; and any of them may administer an Oath so as the adverse party may have notice, to the end such persons may be fairly examined.

Commission may issue out of the Court of Admiralty for examining of witnesses beyond Seas, or in remote places by directions of the Commissioners, and Decrees may be made against body and goods, and against Executors and Administrators, and Execution accordingly; and assess Costs of Suit as to them shall seem just.

But Execution cannot be against Body and Goods for the same debt, but the party must make his Election as at Common Law.

XVIII. But these Statutes took not away that Cognizance which the Courts at *Westminster* claymed upon such Contracts by the Common Law; but onely gave this new erected Court a concurrent Jurisdiction with those at the Common Law: for though the loss happened out of the Realm, yet they had Jurisdiction of the

*Oyles versus  
Marshall, Sty-  
les Rep. 1654.*



*Dowdles case,*  
*Coke lib. 6. fo.*  
*47. 36. Eliz. in*  
*B. R.*

*38 H. 8. Crane*  
*and Beil, Co. 4.*  
*Inst. 138, 139.*

**Cause.** And therefore if an Action is brought upon a Policy of Assurance, though the loss happened at Sea, yet the Jury shall enquire; for the loss is not the direct ground of the action, but the Assumpsit.

The Admiralty have likewise put in if not for an absolute Jurisdiction, yet at least a concurrent one; yet both have been denied them, notwithstanding that the Judge of the Admiralty is Judge of the Court of Assurance.

**XIX.** By the making of an Office Policy according to the Statute, these advantages will follow.

1. If the Policy be lost, if the same be entred with the Register of the Office, the Entry is effectual to answer the matter both at the Common Law, as well as in the same Court, but a private Policy lost is like a Deed burnt, unless that there be very strong evidence, as a Copy and the like, it will be of little value. So that then there will remain nothing but an Equitable relief in *Chancery*, for the satisfaction of the party.

2. If a man Freights out a Ship from *London* to *Cales*; and assures here, he may write to his Correspondant to make an assurance there of the same; if the matter comes before Commissions, they may examine the Ensured upon Oath, and determine therein according to Law and the Customs of Merchants; but at the Common Law the same cannot be, but relief must be had in that point according to Equity in *Chancery*.

3. The same is a Court of Equity as well as a Court of Law.

4. They may decree against 20 Assurers at one time, but at Law they must be sued distinctly; but they cannot compel the Defendants to put in Bail.

5. They may proceed out of Term as well as in Term; and (if the matter will bear it) they may finish a Cause in a fortnights time.

6. The Judgments there given are generally upon mature deliberation, and by reasons well skilled in Maritime affairs; and if their Sentence is thought to be unreasonable, the Lord Chancellor or Lord Keeper may on Appeal determine the same.

## CHAP. VIII.

## Of prisage and Butlerage.

- I. What is Prisage, Where taken, and of what.
- II. Merchants Strangers exempted from the same.
- III. When due, and the exemption of the Citizens of London from the same.
- IV. What Citizens are capable, and where not.
- V. A Forraigner imports and makes a Citizen Executor and dyes; whether he shall have the benefit of the Immunity.
- VI. Where a Forraigner sells to a Citizen before, but he broken, the Ven-

der shall be chargeable.

- VII. Where a Grant to discharge a particular Ship shall be good, and where a Grants to particular persons shall be otherwise.
- VIII. Of Butlerage what and whom are exempted.
- IX. Where the King becomes entituled to the duties.
- X. A Grant to be free of all Customes, Impositions, &c. extends not to Prisage and Butlerage.
- XI. Cinque Ports exempted from Prisage.

**P**risage, is a certain taking or purveyance for Wine to the Kings use; The same is an ancient Dury which the Kings of England have time out of mind had and received; the manner hath been by taking of every Ship or Vessel that should come into this Realm, if ten Tun, to have for Prisage one Tun: and if it contain 20 Tun or more, to have two Tun (*viz.*) *unum ante doleum*, and the other *deorsum*, paying 20 s. for each Tun: And this ancient Immunity they have enjoyed as a Flower of the Crown, and by some has been conceived not grantable away without Act of Parliament. But yet in 6 E. 3. fo. Cafe 15. mentions the same to be grantable over.

Dyer 92. 42.  
165. Fleta, lib. 2.  
cap. 21.

II. King Edward the First having laid some Impositions on the Merchants, which in Anno 25. of his Reign being taken away with promise that neither he nor his Successors should do any such thing without Assent of Parliament: In 31. of his Reign they granted him an encrease of Customes; in lieu of which he granted them many Immunities, as Release of *Prisage*, &c.

Rott. Parl. 3.  
Ed. 1. cap. 1. &c.  
to be granted.

III. *Prisage* is not due till the unlading, or that which is commonly called breaking of Bulk; for the words are, *de qualibet navi importam vini & disonerant inde*.

Trin. 5 Jac. in  
B. R. Kemycot  
and Boggons  
case.

King Edward the Third by his Charter dated 6 Martii Anno Regni primi, granted his Royal Charter of discharge to the Major, Commonalty and Citizens of London, in hac verba, (*viz.*) *Quod de vinis Civium nulla prisage fiat, sed perpetue inde essent quieti, &c.* which was afterwards allowed in the Exchequer.

44 Eliz.

IV. It is not every Citizen that is capable of this Priviledge, but onely thofe that are Refiant within the City, And fo it was Rul'd in the cafe of one *Knowle*; who being a Citizen and free Grocer of *London*. removed his Houfhould *cum pannis*, and did dwell at *Briſtol*, but yet kept his Shop in *London*; and a Ship of his arriving with Wines at *London*, and being unladen, the Prifage was demanded; he claymed the benefit of diſcharge. It was adjudged, he was not capable of the ſame: for he that will claym the benefit of this diſcharge, ought to be *Civis incola Comorans*.

4 Hen. 6.  
*Knowles* cafe.

Hill. 43 Eliz. in  
B. R. Rott. At-  
torn' General  
verſus Sacheve-  
ril and Sneed.

24 H. 6 (A Private Act of Parliament,) Complaint was made, That the Lord Major of *London* would make Strangers Citizens; It was there declared, That this benefit to be diſcharged from payment of *Prifage*, did not extend to ſuch Citizens as were *dotati*, made free, but unto thoſe Citizens onely which are *comorans in-coloant*, and refiant within the City.

Wallen verſus  
Hanger, Bul-  
ſtrod. 3. part,  
fo. 1.

V. If a Forraigner brings a Ship laden with Wines into the Port of *London*, and then makes a Citizen his Executor and dyes, he ſhall not have the benefit of this Immunity from payment of *Prifage* for the Wines, for that they are not *bona Civium*.

VI. If a Forreigner arrives with a Ship laden with Wines at a Port with an intent to unlade, and before the Goods are entred or Bulk is broken, he ſells them to a Citizen, *Prifage* ſhall be paid notwithstanding, for it was never the Kings grant to diſcharge a Citizen in ſuch a manner.

VII. If the King does diſcharge ſuch a Ship of *J. S.* being at Sea, particularly naming the ſame, from the payment of *Prifage*, and he dyes before the Ship arrives, no duty can be demanded.

Hanger's Cafe,  
Hill 13 Jac.

But it has been held, if a particular perſon has a grant to him to be diſcharged of his Goods, and he dyes before the arrival, the duty ſhall be paid.

Bro. tit. Dif-  
claymer, 47.

6 E. 3. fo. 5, 6.  
Archbiſhop of  
*York*'s Cafe.

A *Quo Warranto* was brought againſt three Archbiſhops of *York*, to ſhew cauſe why they demanded to have *Prifage* for Wines brought into the Port of *Hull*; The two firſt pleaded to have onely firſt taſte, and a pre-emption after *Prifage* paid: But the third pleaded a Charter of 15 E. 2. by force of which he claimed the ſame, and Rul'd not good. For though the Charter might be good, yet it was held in that caſe, a diſclaymer by the Predeceſſor ſhould bind the Succeſſor: And at this day, the Duke of *Ormond* in *Ireland* hath an Inheritance in the *Prifage* of Wines by the Kings Charter.

Sir John Da-  
vies in the caſe  
of Cuſtomers.

VIII. *Butlerage* is a Cuſtome due from Merchant-Strangers of 2 s. upon every Tun of Wine brought into this Realm by them.

King

King John granted to the Merchants of *Aquitaine* Trading for Wines thence into *England* divers Liberties, amongst others, *Libertatibus concessis Mercatoribus vinetariis de Ducatu Aquitaniae reddendo Regi & heredibus suis 2. s. de quolibet dolio vini ducti per cosdem infra Regnum Anglia vel potestate Regis.*

All Merchant-Strangers in consideration of the Grant to them by the King of divers Liberties and Freedomes, *Concesserunt de quolibet dolio vini quod adducent vel adduci facerent infra Regnum &c. solvent nobis & heredibus nostris nomine Custumae duos solidos &c.*

It is called *Butlerage*, because the Kings chief Butler doth receive it. And the Double value of the Duties is made penal if any person customes Goods in an other mans name whereby to defraud the King of *Prifage* and *Butlerage*.

IX. Breaking of Bulks is that which entitles the King to the Duty: for if a Merchant Imports Wines to the number of 20 Tuns, yet if he unloads but putt, as 9. or 4 Tun, yet the King shall have the entire *Prifage*; and though the Custome seems to declare, that the taking must be as well before as after the Mast, yet is not the Officer tyed to that strictness, but may take where he pleases; for two Tuns are the Kings due: for otherwise he might cozened, the Freighter perhaps lading other Commodities aboard after the Mast.

If there be but one Tun taken out, yet the Duty must be paid: The reason is, for that otherwise the Officer should be obliged to travel perhaps all over the Kingdome.

X. The King granted to a *Venetian* Merchant that he should be quit, *did omnibus customis, Subsidiis & impositionibus & omnibus aliis denariorum summis debitis & solubilibus pro quibuscunque Merchantizis importandis*; and that he should be as free as the Citizens of *London*: In that case it was adjudged in the *Exchequer*, That by that Grant the King did not discharge him of *Prifage*, because the *Prifage* was not specially expressed in the Grant, although that the City of *London* were by a special Charter freed of *Prifage*.

XI. The Cinque-Ports are likewise discharged of *Prifage*.

*In Libro Rubro in Scaccario.*

*Remem. fo. 265*

*Rot. Chartarum*

*Anno 31 E. 1.*

*no. 44. calle.*

*Charta Mercatoria.*

*See the Charter*

*at larger in the*

*Chap. of Customs.*

*Strat. 1. H. 5.*

*2 Ed. 6. 22.*

*Kenicott versus*

*Hoggan, Teller.*

*Boytens*

*Case, 4. Rep. 44.*

*10.*

*Vouchen in the*

*case of Customs*

*in Sir John Davies*

*Reports.*

*Cl. 1 E. 1. m. 5.*

## CHAP. IX.

Of pilots Wharfage, primage, Averidge, Load-  
manage.

- |   |   |
|---|---|
| <p>I. Of the Pilots charge till the Ship is brought to her place or bed.</p> <p>II. If the Ship is likely to miscarry, what the Ships Crew may do at such time.</p> <p>III. Of Ignorant Pilots their punishment, and if the Ship miscarries, who shall answer.</p> <p>IV. Of Wharfage, and where the Wharfinger shall answer, and what.</p> | <p>V. Primage and Loadmanage where due, and for what, and if the Ropes break, where the Master, and where the Wharfinger shall answer.</p> <p>VI. Petty Averidge where due, and for what, and what money.</p> <p>VII. Loadmanage where due, and for what.</p> |
|---|---|

I. **B**y the Lawes of *Oleron* after that the Pilot hath brought the Ship to sure Harbour, he is no further bound or lyable; for then the Master is to see her bed and to her lying, and hear all the rest of her Burthen, charge and danger, except that of the Act of God; So that before she becomes to her place or bed, and while she is under the Pilot's charge, if she or her Goods perish, or be spoyled, the Pilot must make good the same.

*Lex Oleron,*  
Cap. 23.

II. By the Lawes of *Oleron*, if his fault is apparently gross that the Ships Crew sees an apparent Wreck, they may then lead him to the Hatches and strike off his head; But the Lawes of *England* allow no such hasty execution.

By the Lawes of *Denmark* an ignorant Pilot is to pass thrice under the Ships Keel.

The Master generally in the Charterparty covenants to find a Pilot, and the Merchant covenants to pay him his Pilotage.

III. But if a Ship should miscarry coming up the River under the Charge of the Pilot, it has been a Question, Whether the Master should answer in case of the insufficiency of the Pilot; or whether the Merchant may have his remedy against both? It hath been conceived the Merchant hath his Election to charge either; and if the Master, then he must lick himself whole of the Pilot.

27 H. 8. cap. 26.  
22 Car. 2.  
cap. 11.

IV. *Wharfage* is money paid for landing Wares at a Wharf, or for Shipping or taking in Goods into a Boat or Barge, they commonly keep Boats or Lighters of their own for the carrying out and bringing in of Goods, in which if a loss or detriment happens, they may in some cases be made lyable.

An Action of the Case grounded on the Customs of the Realm

was



was brought against the Defendant, Master of a Wharf, for not safe delivering of Goods, &c. The Case appeared to be thus: The Master unladed a Bale of Silk into the Wharfingers Lighter, and sent part of his Marriners to convey it a shoare; it happened that the Goods were stole: The Question was, Whether the Wharfinger or the Master should answer? Upon a Tryal at *Guild-Hall* before my Lord Chief Justice *Hall*, it was there Rul'd, That the Master was lyable, and not the Wharfinger; for till they are landed, the Master hath them under his power: but if goods are to be sent aboard, there if they miscarry in their passage, the Wharfinger must answer.

*Randall versus  
Hilton and Bar-  
ter. Pasch. 26.  
Car. in B. R.*

V. *Primage* and *Petitedmanage* is likewise due to the Master and Marriners for the use of his Cables and Ropes to discharge the Goods; and to the Marriners for loading and unloading of the Ship or Vessel, it is commonly about twelve pence *per Tun*.

*32 H. 8. cap. 14.  
Leg. Oleron,  
Cap. 10.*

If the Ropes break in hoysing of Goods out of the Ship into the Lighter or Boat, the master must answer if the Goods be damaged or lost.

But if the Roapes break that the Crane in taking them out of the Lighter, (although till they are landed, they are not out of the Masters custody) yet the Wharfinger shall answer.

*Co. Entry, fo. 2.*

VI. *Perry Averidge* is another little small Duty which Merchants pay to the Master when they onely take Tunnage, over and above the Freight, the which is a small recompence or gratuity for the Masters care over the Lading, and in the Bills of Lading they are expressed after Freight, together with *Primage* and *Averidge* accustomed.

Some conceive that the Averidge mentioned in the Bills, is that which is the Averidge or Contribution for losses.

The French Ships commonly term the Gratuity *Haut-Money*, and our English Merchants pay it our Masters over the Freight, it is sometimes more, sometimes less; two or three Pieces.

VII. *Loadman*, is he that undertakes to bring a Ship safe through the Haven to the Key or place of discharge, and if thorough his ignorance, negligence or other fault he suffereth the Ship or Merchandize to perish, an Action lyes against him at the Common Law; and by some conceived he may be punished in the Admiralty but not in both.

*Roughion, Ar-  
tic. Enquiry,  
27, 28.*

The Hire is called *Loadmanage*, the which the Pilot receives of the Master for conducting the Ship up the River, or into the Port to her convenient Bed.

If two Ships lye in a Harbour, and the Anchor of one is feared may occasion to damnify the other, if after request and refusal (and there be probable cause) the other may take up the same, and let

*Per Leg. Oleron*  
*Cap. 15.*

the same down at a further distance, and the same is opposed or hindered, if any damage happens they are to make full satisfaction; so it is if they lay out an Anchor and neglect the placing of a *Bury* to the Anchor, and damage happen thereby, they are not onely subject to be punished in the Admiralty, but likewise to render satisfaction to the party dammified.

*Per Leg. Oleron*  
*Cap. 14.*

If two Ships be in the River, and the one falls foul on the other both being laden, by the Law Maritime the Contribution is to be in Common, and to be equally divided and apprized half by half; but then the *Marriners* must swear there was no fault in themselves: otherwise one that hath an old rotten Vessel which he can no wayes dispose of, may so order the matters as to lay her in the way of a good Ship under sayl, so that the same may be answered in damage: but when the Contribution is made equal, then the contrivance will be avoided.

## CHAP. X.

### Of Bills of Exchange.

I. *Of the Antiquity of Exchange by the Hebrew Law.*

II. *Of the Antiquity of Exchange by the Romans.*

III. *Of Exchanges by other Nations in imitation of these people.*

IV. *Of the several sorts of Exchanges, and of Cambio commune.*

V. *Of Cambiorant, or Exchanges value for value.*

VI. *Of Cambio litto, or dry Exchanges.*

VII. *Of Cambio fictio, or signed Exchange.*

VIII. *Of the Exchanges used this day, and somewhat.*

IX. *How Exchanges are made, and upon Monies in London.*

X. *Monies paid generally, how repaid by Exchange.*

XI. *Of Bills of Exchange payable at single summe.*

XII. *Bills of Exchange at double or triple summe, and of the customary places to certain places from London and Amsterdam to other place.*

XIII. *Of the nature of Bills of Exchange, and how esteemed of by the Lawes of England.*

XIV. *Bills drawn more then one, as present to the parties: and of the true measure of judging of Bill by Custom.*

XV. *What amounts to an acceptance generally, and on refusal where to be protested.*

XVI. *All the drawers are made byable; and whether the party to whom the Money is made payable is bound to procure an acceptance.*

XVII. *Protest, what it means by the same; and where the same is necessary, and where not.*

XVIII. *Bill drawn on two persons, where the same is necessary, and where not.*

XIX. *One Faction serves a Company, where a Bill accepted of him by one of the Company obliges the rest, and where not.*

XX. *What words amount to an acceptance, and what not.*

XXI. *Where*

XXI. Where a Bill may be accepted for pure, and what must be done with the Bill thereupon.

XXII. When a Countermand may legally be made, and when not.

XXIII. How the several parties interested in a Bill of Exchange are obliged and satisfied to each other.

XXIV. How a Collateral security may be annexed to a Bill when the interest elaps'd for non-payment.

XXV. Where the Protest is only necessary to be kept, and where that and the Bill must both be remitted.

XXVI. Bill lost, what is necessary for the parties interested in such case to do.

XXVII. Of Blank Endorsements, the validity of the same.

XXVIII. A Bill once accepted, whether the same may be revoked, and whether it may be accepted to be paid at a longer time than is mentioned: and what Protests are then necessary to be made.

XXIX. Of Bills accepted for the honour of the Drawer, where the same shall oblige.

XXX. The time customary allowed for payment after failure of payment at the day.

XXXI. Of the validity of the speedy protest in relation to recover the money to be paid on the drawer.

XXXII. Bill accepted, and before the day of payment the Acceptor is a paying, what is necessary to be done as in reference to obtaining better security.

XXXIII. Bills accepted for the honour of the Drawer, where turned into a note and remitted by him that gives honour to the Bill.

XXXIV. The Acceptor ready to pay, but the party to whom made payable is dead, what is necessary.

XXXV. Causes general for a Protest, and where satisfaction to the holder or Discharge all parties.

XXXVI. Of Exchange by way of Credit.

XXXVII. One pays a Bill before it be due, and the party to whom the same was paid fails, where he shall be answerable to the Drawer notwithstanding.

XXXVIII. Of Bills assignable over according to the Customs of Merchants, what operations in England.

**T**HE Exchange for Moneys is of great Antiquity as well by observation of the *Hebrew* Customs, as those of the *Romans*.

Upon the first of the month *Adar*, Proclamation was made throughout all *Israel*, That the People should provide their half *Shekels*, which were yearly paid towards the Service of the Temple according to the Commandment of *God*; on then 25th of *Adar* then they brought *Tables* into the Temple, that is, into the outward Court where the people stood) on these *Tables* lay the lesser *Coyns* which were to furnish those who wanted half *Shekels* for their Offerings, or that wanted lesser pieces of Money in their payment, for *Oxen*, *Sheep*, *Doves* and the like which stood there in a readiness in the same Court to be sold for *Sacrifices*; but this supply and furnishing the people from those *Tables* was not without an *Exchange* for other money, or things in lieu of money, and that upon advantage; Hence

Ewod. 30. 31.

Moses Katsenfas  
Printed at Venice 1557. de  
Stelis, f. 122.  
Col. 2.

ee all those that fate at the Tables were called *Bankers*, or Masters of the *Exchange*.

Alex. Gendier:  
L. 5 cap. 30.

II. By the *Romans* it is supposed to be in use upwards of 2000 years, Moneys being then elected out of the best of Metals to avoid the tedious carriage of Merchandize, from one Countrey to another, So other Nations imitating the *Jews* and *Romans*, erected Mints, and coyned Moneys; upon which the Exchange by Bills was devised, not onely to avoid the danger and adventure, but also its troublesome and tedious carriage.

III. Thus Kingdoms and Countreys having by their sovereign authorities coyned Moneys, caused them to appoint a certain Exchange, for permutation of the various Coyns of several Countreys, without any transportation of the Coyn, but giving *par pro pari*, or *value for value*, with a certain allowance to be made those *Exchangers* for accommodating the Merchants.

IV. As Commerce became various, so Exchange numerous; but generally reduced to four, *Cambio Commune*, *Cambio real*, *Cambio secco*, and *Cambio ficticio*.

Reg. Orig. 194.  
Statut. 5 R. 2.  
cap. 2.  
3 H. 7. 6.

*Cambio Commune* in England was those that were Constituted by the severall Kings, where having received Moneys in England, would remit by Exchange the like sum to be paid in another Kingdom. Edward the Third, to ascertain the Exchange, caused Tables to be set up in most of the general Marts or Ports of England, declaring the values of all or most of the Foreign Coyns of those Countreys where his Subjects held correspondence or Commerce, and what allowances were to be made for having Moneys to be remitted to such Countreys or Kingdoms.

18 E. 3. *Acton*.  
*Burnel*.

V. *Cambio real*, was when Moneys were paid to the Exchanger, and Bills were drawn, without naming the Species, but according to the value of the severall Coyns, which two Offices afterwards were incorporated, and indeed was no more but upon payment of Moneys here in England to be repaid the just value in Money in another Countrey, according to the price agreed upon between the Officer and deliverer to allow or pay for the exchange of the money and the loss of time.

This Usury was  
first introduced  
by the *Jews*  
here in England.

VI. *Cambio secco*, or dry Exchange, is when a Merchant hath occasion for 500 l. for a certain time, and would willingly pay interest for the same; the Banker being desirous to take more than the Statute gives, and yet would avoid the same, offers the 500 l. by Exchange for *Cales*, whereunto the Merchant agrees; but the Merchant having no correspondence there, the Banker desires him to draw his Bill, to be paid at double or treble usance, at *Cales*, by

Robin-

*Robin-Hood*, or *John-a-Noakes* (any feign'd person) at the price *Vide Co. 2. l. 1. s. 106.* the Exchange is then current; accordingly the Merchant makes the Bill, and then the Banker payes the moneys; which Bill the Banker remits to some Friend of his to get a Protest from *Cales* for non-payment, with their Exchange of the money from *Cales* to *London*, all which with costs, the Merchant is to repay to the Banker; sometimes they are so conscientious as not to make above 30 per Cent.

VII. *Cambio fictitio*, when a Merchant hath occasion for Goods to Freight out the Ship, but cannot well spare money; The Owner of the Goods tells him he must have ready money, the buyer knowing his drift, it is agreed, that the seller shall take up the moneys by Exchange for *Venice*, or any other parts; but then the Merchant must pay for Exchange and re-exchange.

So likewise where the Merchant is become indebted to the Banker, they are contented to stay, the Merchant paying Exchange and re-exchange; the which he will most certainly compell him to do.

These two last wayes of grinding the face of the generous Merchant, was afterwards prohibited, but, notwithstanding, it was found impossible to moderate the inequality of Exchanges, and to give value for value: so that at this day it seems to be a Cold, that any an honest man is apt to catch.

VIII. The just and true Exchange for Moneys that is at this day used in *England* (by Bills) is *par pro pari*, according to value for value; so as the *English* Exchange, being grounded on the weight and fineness of our own Moneys, and the weight and fineness of the Moneys of each other Country, according to their several Standards proportionable in their valuation, which being truly and justly made, ascertainment and reduces the price of Exchange to a sum certain for the Exchange of Moneys to any Nation or Country whatsoever: As for instance.

If one receives 100 l. in *London* to pay 100 l. in *Exeter*; this by the *Rate*.

But if a Merchant receives 100 l. in *London* to pay 100 l. at *Paris*, there the party is to examine and compare the *English* weight with the weight of *France*, the fineness of the *English* Sterling Standard with the fineness of the *French* Standard; if that at *Paris* and that at *London* differ not in proportion; then the Exchange may run at one price, taking the denomination according to the valuation of the Moneys of each Country; but if they differ, the price accordingly rises or falls: and the same is easily known, by knowing and examining the real fineness of a *French* 5 s. piece, and an *English* 5 s. piece, and the difference which is to be allowed for the want of fineness.



nels or weight, which is the Exchange, and so proportionably for any Sums or Moneys of any other Country; the which is called *Par*, or giving value for value.

\* And therefore But this Course of Exchange \* is of later years abused, and now some are of opinion, that there can be no certain rate set on the *Par* in Exchange, Moneyys are made a meer Merchandize, and does over-rule Commodities, and Moneyys rise and fall in price according to the plenty and scarcity of Money.

change, to answer justly the value of the Coyns of Forraign parts, by reason of the diversity of them, and of their intrinical values. *Vide Sir Robert Gossens Posthuma, fo. 306.*

IX. As Money is the common measure of things between man and man within the Realm, so is Exchange between Merchant and Merchant within and without the Realm; The which is properly made by Bills when Money is delivered simply here in *England*, and Bills received for the repayment of the same in some other Country either within the Realm or without the Realm, at a price certain, and agreed upon between the Merchant and the Deliverer.

For there is not at this day any peculiar or proper Money to be found in Specie whereupon Outland Exchanges can be grounded; therefore all Forraign Coyns are called imaginary.

Cro. 2. fo. 7.  
Martin versus  
Bour. Pasch.  
Jac. in B. R.

At *London* all Exchanges are made upon the pound sterling of 20 s. and 12 d. to the shilling, for *Germany*, *Low-Countries*, and other places of *Trafique*: and for *France* upon the *French Crown*: for *Italy*, *Spain*, and some other places, upon the *Ducate*: For *Florence*, *Venice*, and other places in the *Straits*, commonly by the *Dollar*, and *Florin*.

X. Bills drawn to be paid, are either at sight, or a time certain, single, double or treble *usance*; and are commonly about 3 for fear of miscarriage.

The taking and delivering money at sight binds the taker up to give his Bill to pay at sight, or within some short time the like sum after such a rate the Pound, Dollar, Ducate or Crown, as is agreed between them in Forraign Coyn, either according to the valuation of Moneyys, or current Moneyys for Merchandize.

XI The second time of payment is called *Usance*; it is known or taken to be the compass of one month, to be computed from the date of the Bill, and that governed according to the custome of the place where those Exchanges do run.

XII. The third is double or treble *Usance* 2 or 3 months; sometimes there are Exchanges made upon half *Usance*.

The times of payment do alter the price of Exchanges according to time, commonly after 12, 15, or 20 in the Hundred by the year.

Uſance from London to	<i>Middelborough</i> <i>Amſterdam</i> <i>Antwerpe</i> <i>Bridges</i> <i>Roſterdam</i> <i>Liſle</i> <i>Rome</i> <i>Paris</i>	are generally accounted one months time from the date of the Bill.	
Uſance from Amſterdam to	<i>Rome</i> <i>Genoa</i> <i>Venice</i> <i>Naples</i> <i>Palermè</i> <i>Luca</i> <i>Sevil</i> <i>Lisbon</i>	Are generally accounted 2 months from the date, &c.	The Bills may have a larger, ſometime a ſhorter time, there is no direct certainty, but onely that ſingle Uſance is a month; double Uſance 2. month, &c.
From London to	<i>Florence</i> <i>Venice</i> <i>Leighorne</i> <i>Zant</i> <i>Aleppo</i> <i>Lucia</i>	is ſometime accounted treble Uſance from the date of the Bill.	

XIII. *Excambium vel Cambium*, or as the Civilians term, *permutatio*; *Billa Exambii* ſignifieth no more but a customary Bill, ſolemnized by a numerous conſent of Traders, to have a reſpect more then other Bills, though of as high and as intrinſical a value: And thoſe that give ſuch Bills were called *Exchangers*, or *Bankers*.

Though the Act was no more but to keep up the life of Commerce, (without which it is impoſſible for any Nation to flouriſh;) yet could not any perſon draw ſuch bills, or return Money beyond Seas, without Licence firſt obtained of the King.

But at this day any man may do it without being obliged to obtain ſuch leave.

XIV. Such a Bill being drawn, they commonly take one or two more of the ſame date word for word, onely this Clause is

H h

in-

Reg. Orig. ſo.  
194. Statut 5 R.  
2. Cap. 2.

*Constitutio  
quandocunque  
pro lege Serva-  
tur faith Bract-  
on, in partibus  
ubi fuerit more  
statutum appro-  
bata; longavi-  
enim temporis  
us & consuetu-  
dinis non est vilis  
auctoritas, lib. 1.  
Cap. 3.*

inserted in the second, My first of the same date persons and sum not being paid: And in the third, My first and second of the same date, and contents not being paid.

The right measure of judging on Bills of Exchange is purely by the laudable Custome often reiterated over and over, by which means the same hath obtained the force of a Law, and not the bare and single opinion of some half-fleg'd Merchant: For Bills of Exchange are things of great moment as to Commerce, and are neither to be strained so high, as that a man should not cast his eye on them but the same shall be taken to be an acceptance: nor on the other hand having duly accepted them, the same should be rashly and unadvisedly avoided, by the shallow fancy of such nimble pated shufflers; but they are soberly judged and governed, as the same hath generally been approved of and adjudged of in former Ages.

XV. A Bill being remitted, the party is to go immediately to the person to whom the same is directed, and present the same in order to his acceptance; if it be tendred, and the party subscribes *Accepted*; or, *Accepted by me A. B.*; or being in the *Exchange* says, *I accept the Bill, and will pay it according to the Contents*: this amounts without all controversy to an Acceptance.

But if the same be refused, the party must then procure a *Protest*, and remit the same to the *Deliverer*, who is to resort to the *Drawer* for satisfaction for the principal costs and damage.

Words are made to signify things; By the word, *Deliverer*, is meant he that pays the Moneys beyond Sea. By the word *Drawer*, he that writes or draws the Bill of Exchange; the person upon whom, is called the *Acceptor*.

XVI. If there be several *Drawers* who subscribe, all are liable in case of a *Protest*.

Nor is any such thing as a 3 dayes respit to be allowed for acceptance.

If a Bill is drawn upon a Merchant in *London* payable to *J. S.* at double *Usance*, *J. S.* is not bound in strictness of Law to procure an acceptance, but onely tender the Bill when the Money is due: but Merchants which generally have generous spirits will not surprize a man, but will first procure an acceptance, or at least leave the Bill for the party to consider and give his answer, and then give advice of the same, and if the money be not paid, then *protest*.

XVII. A *protest* is no more but to subject the drawer to answer in case of non acceptance or non-payment; nor does the same discharge the party *Acceptor*, if once accepted; for the *Deliverer* hath now two remedies, one against the *Drawer*, and the other against the *Acceptor*,

To entitle the party to an Action at Law in *England* against the *Accep-*

Acceptor, it matters not whether there be a Protest; but to entitle the party to recovery against the Drawer beyond the Seas or elsewhere, there must be a Protest before a Publicque Notary.

XVIII. A Bill drawn on two jointly must have a joint acceptance, otherwise it must be protested, but to two or either of them,

*contra.*

*Per Jansen in  
lege allegatur  
ff. de conditioni-  
bus indebiti.*

Then if the same be accepted by one, it is pursuant to the tenour of the Bill, and ought not to be protested, but in case of non-payment; and in that case the person acceptor is liable to an Action: but if it be on joint Traders, an acceptance by one will conclude and bind the other.

XIX. A Factor of the *Hamborough, Turkey, or India* Company draws a bill on the same, and a member accepts the same, this perhaps may make him liable, but not another member.

So it is if 10 Merchants shall imploy a Factor at the *Canaries*, and the Factor draws a Bill on them all, and one of them accepts the Bill, and then refuses payment; this will not oblige the rest.

But if there be 3 Joint Traders for the common stock and benefit of all there, and their Factor draws a Bill on them; the acceptance of the one will oblige the residue of the Company.

Mich. 19 Jac.  
C. B. *Vanbeath*  
versus *Turner*,  
Winch. 24, 25.

XX. A small matter amounts to an acceptance, so that there be right understanding between both parties; As, *Leave your Bill with me and I will accept it*: Or, *Call for it to morrow, and it shall be accepted*; that does oblige as effectual by the Customs of Merchants, and according to Law, as if the party had actually subscribed or signed it, (which is usually done.)

But if a man shall say, *Leave your Bill with me, I will look over my accounts and Books between the drawer and I, and call to morrow, and accordingly the Bill shall be accepted*; this shall not amount to a compleat acceptance: for this mention of his Book and Accounts, was really intended to see if there were effects in his hands to answer, without which perhaps he would not accept of the same. And so it was Rul'd by L. Chief Justice *Hale* at *Guild-Hall*.

Trin. 20 Car.  
2 in B. R.

A Bill may be accepted for part, for that the party upon whom the same was drawn had no more effects in his hands; which being usually done, there must be a protest, if not for the whole sum, yet at least for the residue: however, after payment of such part there must be a protest for the remainder.

The receiving of  
part of the Mo-  
neys upon the  
Bill, does no  
ways weaken  
the Bill.

XXII. Any time before the money becomes due, the Drawer may countermand the payment, although the Bill hath been accepted.

*Per leg. publicam  
ff. depositi &  
per Bart. ibidem,  
& per Roma-*

*Romanum fin-  
gulari, 474.*

The Countermand is usually made before a Notary; but if it comes without, so it comes under the parties hand, it is well enough.

If the Bill accepted, and the party desires to have the money before it be due, and it is paid, and then there comes a countermand; it hath been conceived, that he ought not to be allowed, for as he could not enlarge the time, so he could not shorten it, but his duty is to follow his Order.

Words are made to signify things; Therefore by the word, *Deliverer*, is meant he that pays the Money: he that draws the Bill is called the *Taker* or *Drawer*; And the party upon whom, is called the *Acceptor*.

XXIII. *Note.* The Drawer is bound to the Deliverer, and the Acceptor to the party to whom the Bill is made payable; yet both are no bound to one man, unless the Deliverer be a Servant to the party to whom the money is made payable; or the party to whom the money is made payable be Servant to the Deliverer: yet both Taker and Acceptor are lyable till the Bill is paid.

*Stiles, Pasch.  
1654. in B. R.  
fo. 370.*

XXIV. Therefore when you bring your Action, be sure to draw your Declaration accordingly, and make the same part of the Custome as you set it forth; for if you vary, you must expect to be nonsuited: and the party is not bound to alledge a particular place of demand.

If a Bill be returned protested for want of payment, the Drawer is to repay the money and damage, or else he may procure a security, which is no more but another person of value subscribes the Bill, in these or the like words, *I here underwritten do bind my self as Principal, according to the Custome of Merchants, for the summe mentioned in the Bill of Exchange whereupon this Protest is made, Dated, &c.*

Now the Drawer by vertue of this supplymental agreement hath as much time again to pay the Moneys as there was given him in the Bill when it was first drawn; so that if the money is not then paid, together with the Rechange and Charges of the party, the party may recover the same on the Principal or Security.

\* That is for not payment, the Bill Being once accepted.

XXV. Beyond the Seas the protest \* under the Notary's hand is sufficient to shew in Court without producing the very Bill it self. But if a Bill in *England* be accepted, and a special Action grounded on the Custome be brought against the Acceptor, at the Tryal the party Plaintiff must produce the Bill accepted, and not the Protest; otherwise he will fail in his Action at that time.

Therefore it is safe that a Bill once accepted be kept, and onely a  
Pro-



Protest for non payment be remitted; but a Bill protested for not acceptance must be remitted.

XXVI. If a Bill is left with a Merchant to accept; and he loses the Bill or at least it is so mis-laid that it cannot be found; ) if the party shall request the Merchant to give him a Note for the payment according to the time limited in the Bill of Exchange. Otherwise there must be two Protests, one for not acceptance, the other for non-payment; but if a Note is given for payment, if there happens to be a taker, yet in that case there must be Protest for non-payment.

XXVII. A Bill is remitted to J. S. who owes moneys to J. D. delivers the Bill to J. D. and on the back-side subscribes his name; if J. D. receives the moneys, he may fill up the blank as if the moneys had been actually paid to J. S. This is practised amongst Merchants, and by them reputed firm and good. But certainly the Common Law looks upon this filling up of Blanks after a man hath once signed or sealed, to be no better then a harmless forgery.

*Note*, No person, be it Wife or Servant, can accept of a Bill of Exchange to bind the Master without a lawful authority, as a Letter of Attorney, and the like, which must be under-hand, unless that it has been formerly and usually done by the Wife or Servant in such case, when the Master hath been out of Town; who hath approved of the same and answered payment: it must be usually done; but one partner may for another. *Stiles Reports, in B. R. 370.*

A Servant of Sir Robert Clayton and Mr. Adelman Morris, (but at that time actually gone from them) took up 200 Guineys of Mr. Monck a Goldsmith, without any authority of his Masters: (but Monck did not know that he was gone) the Moneys not being paid, Monck brought an Action against Sir Robert Clayton and Morris, and at Guild-Hall it was Rul'd per Keeling Chief Justice, That they should answer, and there was a Verdict for the Plaintiff; And though there was great endeavours to obtain a new Tryal, yet it was denied, the Court at Westminster being fully satisfied that they ought to answer: for this Servant had used often to receive and pay Moneys for them; and thereupon they actually paid the Moneys. *Monck versus Clayton Mill, and Morris. Mich. 22 Car. 2. in B. R.*

*Note*, That which will oblige the Master, will be the authority and liberty which he usually gives the Servant; therefore such a

And though the same

seems an act of Wisdome for Merchants and others so to take, yet it oftentimes proves the destruction of many a Family: The Father puts out the Son perhaps with no less then 2 or 300 l; and is himself become bound for his Truth and just Accounting, &c. The Servant is immediately trusted with his Cash; and then he too young experience'd in the World, either neglects keeping a just account, or keeping that, subjects his Masters Cash to be spent by himself and those who make it, their sole Trade to betray such Youths: The Master finding the consumption, calls his Servants to account, who conscious of the act, forsakes his Service, dares not see his Relations, and then as a general consequence falls into a Company, the which nothing but Providence can preserve from taking their wicked courses. The Father is called to answer, (what ever the Master does say the Servant hath spent or imbezzled) none being able to contradict him, he must with a heart full of grief submit to and pay, besides the loss of the Moneys advanced upon the Servant's first putting forth: Which sometimes proves a great affliction in a Family. On the other side, if Servants were not to be entrusted, the Mystery could not be learn'd, nor the business dispatched, and therefore faith must be given: but then it were Justice and Honesty that as a Father puts perhaps the Child of his love to one in whom he reposes a faith and trust, that the Master should be then as a Parent, so they should prevent all occasions that might subject them to Temptations, and not be over-hasty in Trusting them with the Cash: which is the very Bait our London Gamesters catch Gudgeons.

If a Bill of Exchange by contrary Wind or other occasions be so long on the way that the Usance or time limited by the Bill be expired, and being tendred, both acceptance and refusal are denyed; protest for both must be made, and the Drawer must answer the value, rechange and damage.

*Rastal 339.*

*Bald. in rubr. de constitut. pecuniarum ult. Col. & Leg. quidem ff. eodem Col penult.*

XXVIII. A Bill once accepted cannot be revoked by the party that accepted it, though immediately after and before the Bill becomes due, he hath advice the Drawer is broke.

If a Bill not accepted to be paid at the exact time, it must be protested; but if accepted for a longer time, the party to whom the Bill is made payable must protest the same for want of acceptance according to the tenour: yet he may take the acceptance offered notwithstanding. Nor can the party if he once subscribes the Bill for a longer time, revoke the same, or blot out his name, although it is not according to the tenour of the Bill; for by his acceptance he hath made himself debtor, and owes the draught made by his Friend upon him, whose right another man cannot give away, and therefore cannot refuse or discharge the acceptance.

*Note.* This case will admit of two Protest, perhaps three:

1. One Protest must be made for not accepting according to the time.
2. For that the money, being demanded according to the time mentioned in the Bill, was not paid.
3. If the Money is not paid according to that time that the Acceptor subscribed or accepted.

*Bald. in Leg. pro debito C. de bon. actor. fuit pos. sicut. & per Bar. sol. in Leg. singularia. Col. 7. ff. probatur.*

*A. draws*

A. draws a Bill on B. and B. is in the Country; C. a Friend of his hearing of the Bill accepts it: the party to whom the money is to be paid must make a protest for non-acceptance by B. and then he may take the acceptance of C. and it shall bind C. to answer the Money.

If a Bill is drawn on B. and B. happens to be in the Country, and a Friend of his desires the party not to protest, and he will pay the same; it is good, and shall bind such party. *Pinclard versus Fewk, Styles, 416.*

If there be two joynit-Merchants or Partners, and one of them accepts a Bill of Exchange, the same shall bind the other; and an Action of the Case on the Custome may be maintained against him. *Pasib. 1654. in B.R. Styles 370.*

XXX. Merchants generally allow 3. dayes after a Bill becomes due for the payment; and for non-payment within the 3. dayes protest is made, but is not sent away till the next Post after the time of payment is expired. *London.*

If *Saturday* it the third day, no protest is made till *Monday*. *Holland.*

XXXI. The use of the Protest is this, That it signifies to the Drawer that the party upon whom he drew his Bill was unwilling, not to be found, or insolvent, and to let him have a timely notice of the same, and to enable the party to recover against the Drawer. *There are two Protest, 1. For non acceptance which is called, intimation. 2 for non-payment.*

For if one draws a Bill from *France* upon a person in *England*, who accepts and fails, or becomes insolvent at the time of payment, if there be not a Protest and \* timely notice sent to the Drawer there, it will be difficult to recover the Money. *\* which is look'd upon to be the third day.*

In *Holland* they are not altogether so strict, yet there must be a reasonable time of notice; the reason is, for perhaps if he had reasonable and timely notice, the Drawer then might had Effects or other means of his upon whom he drew, to reimburse himself the Bill; which since for want of timely notice he hath remitted or lost. And the general Rule is, That though the Drawer is bound to the Deliverer till the Bill is satisfied, yet it is with this proviso, that protest be made in due time, and a lawful and an ingenious diligence used for the obtaining payment of the Moneys; for it were unreasonable the Drawer should suffer through his neglect. *There is no danger, be the party never so responsible, to protest immediately if the money be not paid when it is due, i. e. the third day; but there may (especially beyond Seas) be great hazard for want of protelling.*

XXXII. Where a Merchant hath accepted, and before the same became due, he becomes insolvent, or at least his credit publickly blasted, a Protest ought to go; but then there is usually a demand made, which once coming, the Drawer is compellable to give better *In leg. pro debita in fine C. de bonis author. Judi. possiden.*

better security; and if a second Bill comes if no protest, then Drawer and Security lye at stake.

XXXIII. If a Merchant draws a Bill, and there is a Protest for non-payment; if another person hearing of the same declare, that he for the honour of the Drawer will pay the contents, and thereupon subscribes; he is obliged thereby: and in this case it has been practised, that the party that received the money hath put his name on the back-side of the Bill in *Blanck*; but the receipt is sometimes taken on the protest, which together with the whole proceeding is turned into an act, and the same being drawn by the Notary, is remitted to the Drawer by him who gave honour to the Bill.

14 dayes allowed from the death before Administration can be committed, unless there be a Will.

But an intimation ought to go, and that the Acceptor is willing to pay according to Order.

XXXIV. If a Bill be accepted, and the party dyes, yet there must be a demand made of his Executors or Administration; and in default or delay of payment, a Protest must be made: and although it may fall out, that the Moneys may become due before there can be Administrators, or the Probate of the Will be granted; yet that is delay sufficient for a Protest in case of non-payment.

But on the other hand, if the party be dead to whom the Moneys are made payable, and the Moneys are ready to be paid; and there is no person that can legally give a discharge; yet a Protest ought not to go for non payment: The reason is, because there is no person that hath any Authority either in deed or in Law to make it, and a Notary ought not to make it; if he does, and the party hath received any prejudice thereby, an Action of the Case perhaps may lye against him for his pains: nor does it avail, that if security be offered to save him harmless against the Executors or Administrators, for that is an act left to his own discretion; for perhaps the security may not be lik'd: but whether good or bad, makes nothing as to oblige him in Law.

But if a man is bound in a Bond to pay a sum of money to *J. S.* his Executors, Administrators, &c. and the Oblige dyes intestate the day before the sum becomes due, yet the Bond is not forfeited if not paid at the day, because there was no body to whom the Obligor could pay to save his Obligation: But as *Littleton* sayes, if it be to pay to *J. S.* generally, you must hunt him out all over the Kingdom, if you'll save the penalty.

XXXV. A man not found, or being found not met withal either at home or the *Exchange*, is cause sufficient for a protest; but in that there must be diligence used in the finding him.

A Bill returned protested for non-payment being once satisfied by the drawer to the deliverer, the drawer is discharged and so is  
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the Acceptor to him to whom the Moneys were to be paid: but, the Acceptor by vertue of his acceptance makes himself a debtor, *secundum consuetudinem Mercatoriam* to the drawer.

XXXVI. Moneys may be had on Exchange by way of Letters of Credit, the which are in two respects, the first general, the other especial.

The general Letter is open, directed, *To all Merchants and others that shall furnish my Servant or Factor, or any other with such and such Moneys*; for repayment of which he binds himself to answer and pay all such Bills of Exchange as shall be drawn on him upon the receipt of the value, by his Servant, Factor or other person: If there be really Moneys advanced on this Letter of Credit and paid to the Factor, Servant or other, and Bills of Exchange are sent to the party that sent such Letter of Credit, and if he refuses to accept, yet according to the customes of Merchants he is bound to pay; the reason is for there was no respect had to the ability of the taker up, but to him that gave his Letters of Credit: and therefore in such case if an Action at Law be brought, the particular custome as to that point must be carefully set forth.

The special Letters of Credit, were one writes a Letter to furnish another mans Factor or Agent; and there is in this the same remedy as above.

As Bills of Exchange seldom come without Letters of Advice; so ought they to be pursued: If a Bill shall express, *And put it to the account of A*; and the Letter of Advice says *B*; this must be protested against, for it cannot safely be paid; at least running the Risque of an equitable Suit.

XXXVII. If one payes money on a Bill before it be due and the party breaks, it has been conceived that the party ought to answer the drawer: The reason hath been, because the drawer might have countermanded the same, or ordered the Bill to be made payable to another.

In *Italy* if Money is paid to a Banker's Servant, and if the Master subscribe, *Pagate com si dice*, this binds the Master as effectually as if he had subscribed it with his own hands.

XXXVIII. A Bill drawn by a Merchant in *London* payable by another person beyond Seas, such Bills in most Countreys are assignable over from Merchant to Merchant, and the last person may sue and recover the same upon an acceptance: But in *England* onely the first person mentioned in the Bill, and to whom the Money is made payable may recover. 'Tis true, such person to whom the Money is made payable, may for valuable consideration deli-



deliver this Bill to another person, and he may endorse an Order on the back-side; and if the party afterwards refuses payment of the same, it may be sued in the parties name to whom the same was transferred, laying the same by way of Custome.

## CHAP. XI.

### Of Moneys advanced by way of Bottomerie, or Fenus Nauticum.

- I. How Commerce is made equivalent to Natural Community.
- II. Whether Money be fit onely to maintain the Trade and Credit of Vice.
- III. Whether Abraham chose to acquire a Property by Money.
- IV. Of the natural and instrumental measure of the value of things.
- V. How Money is equal to all things.
- VI. Money is for buying, and hinders not but helps Permutation.
- VII. Money the Instrument of Charity and Sacrifices, as well our Necessities.
- VIII. Of the differences between Moneys advanced to be used in Commerce at Land, and that which is advanced at Sea.
- IX. Of Money advanced by way Bottomerie when the Contract hath its inception.
- X. Of Money sent on Shipboard, and the Vessel is wrecked, where the Lender shall bear share of the loss, and where not.
- XI. Of Moneys taken up by the Master, where the same shall oblige the Owners, and where not.
- XII. The derivation and institution of this sort of Loan, and for what causes.
- XIII. Of the several wayes of taking up of Moneys by way of Bottomerie, real and feigned.
- XIV. Moneys so advanced; whether gain ought to be bounded, or otherwise left to the will of the Lender.
- XV. Of Usura Maritima, how reasonable the same stands at this day.
- XVI. Of Moneys advanced to a considerable profit called usufruct, being both honest and honourable.

I. Money is one of those things which they who want, want all other things but words to reproach their bad Fortune. But sometimes it is the policy even of Rags and Poverty it self to undervalue that which it cannot have, and to convert that which it hath (though never so mean) into an esteem; and then to lodge as much pride in a Tub, as Alexander could in a Palace, though it could not tempt him to change of Condition.

*Nil habet infelix paupertas diutius in se.  
Quam quod radiculos homines facit —*

No wonder therefore, seeing Rich men will be obstinate to hold  
to

to their advantages that deformed Poverty (which mixes with them in the same frame as a shadow to set off their Colours the better) would have the Rich to descend to them; and that instead of setting out Monies by way of *Bottomery*, *Usury* and the like, they would not have any such thing as money at all, but would have all things reduced into a state as is afore mentioned. \*

\* L. 1. Cap. 1.

S. 1, 2, 3.

It cannot be denied, but that we all live by the natural or intrinsic value of things; but the way to come by them is by an Instrument of civil value, which is Money; instead of Community therefore we now have Commerce: which *Commercium* is nothing else but *Communio mercium*; but Communion must needs be by the means of another thing that may bear equal proportion on both sides, which is Money only. But now let us hear and if possible satisfy the complaints that are made against it so impatiently.

Where there is great Luxury, there must be likewise great Industry to maintain it; and therefore the Industry of this Civil State, must be greater than that which is in the simple state of Nature: But what is there here to blame, seeing Industry no more than Plenty is in it self a Sin?

II. It is the Answer of Envy or Ignorance, *Prima peregrinus obscana pecunia mores* — *inculit* — Money is that (say they) which maintains the Trade and Credit of Vice, if that were taken away, we should look after nothing but necessities, which are virtuous; it makes too nice inequalities and distances, and is not significant enough in the best things: for all the Money in the World is not really worth one penny loaf, which is convertible into our Natures and Substances; it serves only to assure Fortune, but not Virtue, it is accepted as the measure of all things Natural, Moral, and Divine: for Honour is nothing but ancient Riches \*, and in Morals, *Virtus post nummos*; This in Religion breeds that root of all Evil, Covetousness: for in a simple state of Nature necessary things must needs be spent within a short time, and the return of the Sun brings a new supply and a Treasure greater than the *Indies*; Of which One † makes this Observation, That it was got in blood, sayles home in a Sea of blood, and never rests till it be laid out in blood. This was that which was made the Price of *Salvation*, even of the blood of our Blessed Saviour, 30 Pieces for that which was worth Thirty thousand Worlds; but in the Religion of the first times, *Nulla violatum Jupiter auro*, as *Juvenal* hath it.

\* *Aristotelo Po*  
lit.† *Campanella*  
*Monarch. Hisp.*

And if this had not been brought into the World, we should not have so much to discount for at the day of Judgment. Why therefore should that which is condemned to the obscurity of the Earth,

Earth, and lodg'd so near Hell, now be made the price of all that which is above the Earth, even a *Solo usque Catum*? Or why should we be excluded from the Gift of Nature, unless we have those of Fortune? Is it not then more reasonable that Rich men lose this Instrument of Luxury, than the Poor should lose the necessary means of their substance? This is the Plea which is made in *forma Pauperis*, *Et de ipsa paupertate*.

Most certain it is, that neither the stupid simplicity of the Woods, nor Poverty it self are any part of Virtue, and therefore are not reckoned Blessings; as Riches were to *Solomon*, (he who built Gods first Temple, and put his Religion in lustre) and as they likewise were to *Numa*, from whom Money was called *Nummus*: He likewise built the first Temple at *Rome*, and kindled first the Vestal fire, & *ferocem populum deorum metu mitigavit*.

III. We know how God conversed with *Abraham* who was the first that had Money, and made use of it to buy a Property: It is true, they with whom he inhabited called him a Prince; but that was no argument to him to disown their properties, but for the contrary, lest they should think that Dominion or a right to things was founded in grace.

IV. But to come more close to the Question, and to examine the reason and necessity of this measure; Money is like a Law or Government, which are all constituted by the same extream necessity; therefore the counterfeiting or attempting to destroy any of these by private means is every where Treason. Now this measure is two fold, either Natural or Civil, or rather natural, and the Instrument which expresses the natural by equal Permutation; The natural measure is proportioned either by *Want*, or *Plenty*; In *Want* we consider whether the thing be useful or necessary; things which are necessary are best, but of least price, as a Loaf of Bread is more necessary, but infinitely cheaper than a Diamond. One man hath Cloathes, another man hath Leather; those two possibly have no need one of another, and therefore will be no Permutation betwixt them; but if one had need of another, then he who were most prest, would come to the price of the other: And therefore *Want* or *Plenty* is the measure of estimating things, and is the bond of Society, whereby one man shews he is or may be useful to another; and Nature hath so ordered it, that no man is so Rich who hath not some need of the Poor; and no man is so mean and abject, but he may be some wayes useful to the Rich.

Money is like  
the middle term

V. The Civil Measure or rather Instrument whereby the Natural expresses it self, is *Money*, which hath but a feigned value, and therefore it is sometimes higher and lower in esteem as men please;

please; which could not be, and its value were natural which is unalterable. If I have Cloth at such a price, and you have Wines at the same price then we regarding the same price may make an equal Permutation: Or if I give to you so many pieces of Gold for your Cloth at the same price, the Sale is equal again, whether it be an inconvenience that in some Countries † it is sometimes at a higher value than at another, is not consideration of this Discourse; for the price of things themselves change more than any Money doth daily.

of a Syllogisme, of which it is said, *Qua convenient in versio convenient inter se.*

† Poland and generally in most of those Northern Countries.

VI. *Money* is an invention onely for the More expedite Permutation of things; but it doth not follow that men may not make any Permutations but by Money, even as well now as if we were in our natural state; if they who digg now in wast Hills had their Harvest of their Beans well gathered in, but had need of Wine for the Stomachs sake, or of Druggs for healths sake, if the Vintner, or Apothecary have no need of Beans; what use will they make of the Natural value of their Beans without Money? Or if need be, what would they do till their Beans are gathered? Money therefore hinders not Permutation and Commerce of natural things, but assists them; nay, it is therefore an Instrument of Instruments: For he who hath Money, may buy things which he need not use but sell, thereby to get other things afterwards for his use. There is no Nation or People so barbarous, but have Money or a publick Instrument of Permutation either in Metals or Fish-bones, &c. for it imports not so much of what matter it is, provided it be durable, not counterfeitable, and difficult to come by.

VII. Take away this fungible Instrument from the service of our necessities, and how shall we exercise our Charity, which is a branch of Religion and Justice, as well as of humanity? He who goes to Church passeth as it were thorough two Temples, the Poor at the Porch, and the Temple it self: and the giving at the Porch is called Sacrifice, Offering and Gift, as well as that at the Altar. God would be sacrificed to onely in one Town of the World, *Jerusalem*: But could that have been, if *Money* and *Money-changers* had not been allowed? How could they who came from such remote places have by any other means brought their Oxen, Calves, Goats and Doves to the Altar? If there were nothing further to shew, but that one piece, which our Saviour himself coyned miraculously in the mouth of a Fish, it were Argument sufficient that the use of *Money* may be both good, just, and necessary.

*vide Chap. of Exchange, §. 1*

VIII. Things beings thus stated, and that *Money* is both good, just and necessary, it will be demanded loudly, That admitting a reasonable advantage may be made by way of Usury, *qua jure* it is that an advantage upon the same more than what the Law allows, is taken?

*Leg. 3. D. de  
Naut. fen. l. 1.  
cod. l. 62. D. de  
rei Vindic.  
Locinius, lib. 2.  
Cap. 4. §. 2.*

*+ Leg. Fan.  
Naut. leg. peri-  
culi cod.*

The distinction is great between *Moneys* lent to be used in Commerce at Land, and that which is advanced to Sea. In the first, the Lawes of the Realm have set marks to govern the same, whereby the Avaritious mind is limited to a reasonable profit; The reason of that is, because the Lender runs none, but the borrower all the hazard whatever that *money* brings forth. But *money* lent to Sea, or that Which is called *pecunia trajectitia*, there the same is advanced on the hazard of the Lender, to carry (as is supposed) over Sea, so that if the Ship perishes, or a spoliation of all happens, the Lender shares in the loss without any hopes of ever receiving his Moneys; and therefore is called sometimes *usura Maritima*, as well as *Fenus Nauticum*; the advantage accreing to the Owners from their Money, arising not from the loan, but from the hazard, which the Lender runs; the which is commonly reduced to a time certain, or one or more Voyages, according to their severall and respective agreements.

*Vide Passim ad  
leg. de Fen.  
Naut. & D. D.  
leg. Naval. Rhod.*

*Vide leg. 3. C.  
de Fen. Naut.*

IX. If the Bonds be sealed and the *money* is advanced, if the Ship happens to miscarry by storm, Fire, Enemy, or any otherwise before the Voyage begun, then the borrower runs the Risque, unless it be otherwise provided generally, as that if such a Ship shall not arrive at such a place at such a time, &c. there the contract hath its inception from the sealing; but if the Condition be, That if such a Ship shall sayl from *London* to *Amsterdam*, and shall not arrive there, &c. There the contingency begins not till the departure. Yet it has been conceived, That if the Master takes up Money accordingly and buyes in a lawful Lading, but will happen to endeavour to defraud the Prince or State of their Customes, and puts such Goods aboard by means whereof he has incurred a forfeiture of his Ship; in such case the Lender is not obliged to such Hazard.

*Leg. Naval.  
Art. 17.*

X. If *money* be lent on Shipboard by a Merchant *super Cargoe* or a passenger, and before the day of payment the Ship happens to be wreckt or cast away; if there be such a Saver as will admit a Contribution, then the party is not to have his whole *money*, but is to come into the Average: but if the time of payment were past before the misfortune happened, then the Lender must be repaid his whole Money free from Contribution.

*Art. 18.*

And therefore by the Laws Maritime, if the borrower detains any such lent Moneys beyond the term appointed for the repaying, he shall at his return not only pay the profit agreed on before the Voyage, but also augment the same according to the time that hath accrued since the day of payment.



XI. A Master of a Ship hath no power to take up *Money* by *Bottomerie*, in places where his Owner or Owners dwell, unless it were for so much only as his part cometh unto in the said Ship: otherwise he\* and his Estate must stand liable to answer the same. But when a Master is out of the Country, and where he hath no Owners, nor any Goods of theirs nor of his own, and cannot find means to take up by Exchange or otherwise, and that for want of *money* the Voyage might be retarded or overthrown, *Moneys* may be taken up upon *Bottomerie*, and all the Owners are liable thereunto; otherwise he shall bear the loss, that is, the Owners are liable by their Vessel, though the *money* is not so employed in truth; and the Owners have their remedy against him who they put in trust: but the persons of the Owners are no ways made liable by the act of the Master for *moneys* taken up.

If Owners agree not in setting out the Ship, most voices shall carry it, and then *money* may be taken up for their part by *Bottomerie*, or *Fœnus Nauticum*, or by *Hypothicating* such a proportion of the Ship.

Many Masters of Ships having Ensured or taken up *Moneys* upon *Bottomerie* to greater Sums of Money than the Value of their Adventure, do wilfully cast away, burn, or otherwise destroy the Ships under their charge, the same was made Felony, and the person or persons so wilfully doing or procuring the same to be done, were to suffer death.

XII. The signification of this *Fœnus Nauticum*, is by the Dutch called *Bomerie*, *Bedmerie*, *Bodemerie*, *Boddemeris*; so variously pronounced from the Keel\* or bottom of the Ship upon the parallel, whereof the Rudder of a Ship doth Govern and direct the same, *parte pro toto sumpta, ita primum appellata, cum etiam Lingua Gallorum antiqua & Britanica Bodo vel Bodun fundum aut profundum signet † in quem navis fundum, vel ipsum navem ejusque usum mutuo accepta est pecunia, sed postea latius pro fanore nautico etiam usurpari capit.* And the Money so taken up by the Master is done upon great extremity, and that for the completing of the Voyage when they are in distress and want in some Foreign parts, and indeed such taking up is indeed in the nature of Mortgaging the Ship, for *la Neisse oblige al payment de ceo, &c.* And in the Instrument there is a Clause that expresses that the Ship is engaged for the performance of the same.

*Moneys* that are advanced are upon two Securities, the one is on the bare Ship, the other upon the person of the Borrower, sometimes upon both: The first is where a man takes up *Moneys* and obliges

\* *Testatur Pinus in Pockium ad. LL. Nautic. quem vide pag. 95.*

*Lex. Oleron. Cap. 1. Lex. 4. D. de Navi. fen. l. 1. C. end leg. qui Rome & Cal. Ismachus de verb. ob. & ibi. Gothfr. & alios.*

*Scarborough and Lyrius, Pasch. 3 Car. in B. R. Rott. 213. Noy 95.*

*16 Car. cap. 6. A good Law, and ought to be encouraged; It's pity it was not continued.*

\* *Joh. Locinij, l. 2 Cap. 4. §. 1. Latches Rep. fo. 252. Scarborough's case.*

† *Teste Cadeno in Britannia, p. m. 149.*

*Locinij lib. 2. Cap. 4. §. 11.*

obliges himself, that if such a Ship shall arrive at such a Port, then to repay (perhaps) double the sum lent; but if the Ship happens to miscarry, then nothing.

XIII. So likewise some will take up Moneys, the condition reciting, Whereas there is such a Ship, naming her, bound to *Amsterdam*, where of such a Man is Master, (whereas indeed there is no such Ship or Master in nature) that if that Ship shall not arrive at such a place within 12 months, the money agreed on to be paid shall be paid; but if the Ship shall arrive, then nothing. The first of these is honourable and just according to the laudable practice among Maritime persons; and though the advantage runs high, as 20, 30, nay sometimes 40 *per Cent.* Without consideration of time; for the Moneys are to be paid within so many days after the Ships safe arrival; yet in regard the Adventure is born by the Lender, (for if the Ship perishes, the advancer loses) the Lawes and Practice of all Maritime Countries allow of the same. And therefore by the *Common Law*, if an Action of Debt be brought on such an Instrument, the Defendant cannot plead the *Statute of Usury*. And so it was adjudged where one *Sharpley* had brought an Action of Debt on a Bond for Moneys taken up upon *Bottomerie*; The defendant pleads the *Statute of Usury*, and shewed, that a certain Ship called the *made a Voyage to Fish in Newfound Land* (which Journey might be performed in eight months) and the Plaintiff delivered 50 l. to the Defendant to pay 60 l. at the return of the Ship to *D*, and if the said Ship by Leakage or Tempest should not return from *New-found-Land* to *D*, then the Defendant should pay the principal money; and if the ship never returned, then nothing to be paid. Upon \* Demurrer it was adjudged the same was not Usury: for if the Ship had stayed at *New-found-Land* 2 or 3 years, yet at her return but 60 l. was to be paid; and if she never returned, then nothing.

*Tototit. Dig. & Cod. de Naut. sen. & Doctorum sic hardus in tit. Cod. de Naut. sen. 4.*

*Trajectitia pecunia propter periculum creditoris quamdiu navigat navis, infinitas usuras copere potest; upon which Law it was observed by Anianus, Quia Maris periculo committitur, quantitas convenit usuras hanc pecuniam dare Creditor potest.*

*Verum enim vero hic proprium non est aridam-natum senas sed compensationem aliquam periculi, quod creditor contra naturam mutui in se recipit patrim. Johannes Locinus. Lib. 2. Cap. 4. §. 1. & 2. \* Trin. 6 Jac. in B. R. 2 Cro. 258. Sharpley versus Harrol.*

The other advance which is upon a fictitious Inposition of a Ship and Master, where indeed there is no such in Nature, is more unconscionable, the same being the common practice that's used amongst the *Italians*, and now on this side water: The same is as to internal Right unjust, and cannot now be determined, since it was not long since adjudged \* that such Contract was good,

\* C. B. Hill. 22, 23. Car. 2.

according to the *Common Law* of this Realm, and that on a Special Verdict.

XIV Most certain it is, that the greater the danger is, if there be a real adventure, the greater may the profit be of the Moneys advanced: \* And so hath the same been the Opinion of Civililians, and likewise some Divines; though some seem to be of opinion, That any profit or advantage ought to be made of Moneys so lent, no more than of those that are advanced on simple loan, and on the peril of the borrower. However, all or most of the Trading Nations of Christendome do at this day allow of the same, as a matter most reasonable, by reason of the contingency or hazard that the Lender runs; and therefore such Moneys may be advanced several wayes, and a profit may arise so that there runs a peril on the Lender.

*Vide Carolus Molinæus de usur. q. 3. n. 92. ait, hoc approbant. omnes Theologi ut Creditor possit aliquid accipere ultra sortem pro susceptione periculi. But surely that must be upon a real venture.*

Cl. Salmasius, cap. 9. *de modo usur. fo. 380. 188. 218. Trajectitia pecunia propter periculum creditoris, quamdiu navigat navis, infinitas usuras capere potest. Upon which place Anianus observes, Quia maris periculo committitur in quantas convenerit usuras hanc pecuniam dare creditor potest. Vide Novel. Const. 106. 110.*

There is likewise a second way of advancing of Moneys called *Usura Maritima*, joyning the advanced moneys and the danger of the Sea together; And this is obliging sometimes upon the Borrower's Ship, Goods, and Person: The produce of which by agreement will advance sometimes 20, 30, and sometimes 40. *per Cent.* As for instance, A private Gentleman has 1000 l. ready money lying by him, and he has notice of an Ingenious Merchant that has good Credit beyond Seas, and understands his business fully, applies himself to him, and offers him 1000 l. to be laid out in such Commodities as the Merchant shall think convenient for that Port or Country the Borrower designs for, and that he will bear the adventure of that Money during all that Voyage; (which he knows may be accomplished within a year) hereupon the Contract is agreed upon, 6 *per Cent.* is accounted for the Interest, and 12 *per Cent.* for the Adventure outwards, and 12 *per Cent.* for the goods homeward; so that upon the return the Lender receives 30 *per Cent.* which amounts to 1300 l. The Lender in this case hath a good bargain, no question. Now let us see what advantage the Borrower hath.

*usura legitima ejus qui trajectitiam pecuniam trans mare revolvendam accipitur, id est cum periculo suo, censetur legitima est.*

1. The Borrower prevents the taking up the like Sum at Interest which comes to 6. *per Cent.* and Brocage which comes now in this Age thorough the generosity of the Merchant, and Covetousness of the Scrivener, at 1. or 2. *per Cent.* more; and then the same is let out but for 6 months, and then the Scrivener in-

evitably at the 6 months ends sends his Note, that his Friend expects his Moneys to be paid in; so that to stop that gapp there must be Continuation; which is at least one *per Cent.* more, besides the obliging of Friends in Securities.

2. The *Assurance* prevented, which perhaps may come to between 5 and 20 *per Cent.* according as the Times are; and common prudence will never suffer a Merchant to venture 2. parts of 3. parts of his Estate in one Bottom without assuring.

3. As he shall not have occasion to Ensure, so it may be a great occasion of preventing the common Obligation of his Ensuring of other; the which in a generous Merchant in honour cannot be denyed, the *Premio* running pretty reasonable.

4. It prevent the parties running the Risque and danger of the Seas, Enemies, or any other fatal loss, and hath been a means to introduce a mans credit in a short time at lesser charge, if not to put him in a Condition not to be beholding to such a fair, though chargeable means.

And this cannot be *Usury* by the Lawes of this Realm, for the Risque and Danger that the Lender runs.

XV. There is also another way, but that is both Honest and Honourable, called *Usufruite*, that is a Stock in a Company or Society which is perpetual; such a Stock or Portion may be purchas'd, that is, the advantage or benefit arising by the improvement of the same.

As for Instance, The *East-India* Company hath a *Stock* lodged in their hands by divers persons, which they in the most prudent manner as they see fit, imploy to those places as they judge most proper; if a return is made, the advantage of that is distributed to each person that is any way entitiled to that *Stock*: which advantage is called a *Dividend*, and perhaps may afford some years 20 or 30 *per Cent*: But on the other hand, if that that proportion of the Stock which goes out happens to miscarry, the abatement is proportionable, and so the Stock may be lessened, unless that they will stay the *Dividends* to keep the Stock; the which they make do, For it is a Trust reposed of so many mens Moneys in their hands, to yield them such advantage as they shall upon a just account see out: So that if a man hath a 1000 l. Stock, he cannot take the same out of the Great Stock whereby to lessen the same, but he may transfer that *usu-fruite* by that Customary way which they have to any other person, for a valuable consideration *minimum*. Such a Stock of 100 l. in the *East-India* Company in time of War might have

In the *East-India*, and in some other Companies.

*Pindford* versus *Northoe*, Pasch. 27. Car. 2 in B. R. adjudged there on a Special Verdict.

have been purchas'd for 80 l. *Nett*: but now in time of Peace scarce got under 170, or 180 l. the Dividends running high.

## CHAP. XII.

### Of Impositions called Great Customes, Petty Customes, Subsidies.

- I. Impositions, whether they may be commanded without the Three Estates, and of Magna Charta touching the same.
- II. Of Impositions made voluntary by consent of Merchants, and of the annul of the same.
- III. Of the Confirmation of the Great Charter for free Traffique; and of the Settlements now made on his Majesty of the same.
- IV. Of the Immunities formerly of the Hanſatique Towns here in England, and when determined.
- V. Of the Antiquity of Customers or Publicans as well in former Ages as at this present time, in most Nations.
- VI. Of the Imposition called Magna Custuma.
- VII. Of that which is called Parva Custuma payable by strangers, and the Act called commonly Carta Mercatoria.
- VIII. Of Subsidy, and of what, and the Rates how set.
- IX. Of Subsidy by Strangers on Wines.
- X. Of Goods not rated how to pay.
- XI. Of the Subsidy-Duty for Cloaths.

**T**HAT Impositions neither in the time of War or other the greatest necessity or occasion that may be, (much less in the time of Peace) neither upon Forraign nor Inland Commodities of what nature soever, be they never so superfluous or unnecessary, neither upon Merchants Strangers nor Denizens may be laid by the King's absolute Power without Assent of Parliament, be it never so short a time.

By the Statute of Magna Charta, Cap. 30. the words are, *All Merchants as they were not openly prohibited before shall have their safe and sure Conduits, to enter and depart, to go and carry in the Realm, as well by Land as by Water, to buy and sell without any Evil Tolls, by the Old and Rightful Customes (except in the time of War and if they be of the Land making War against Us, and be found in Our Realm at the beginning of the War, they shall be attached without harm of Body or Goods, untill it be known to Us or Our Justices how Our Merchants be intreated there in the Land making War against Us.* The Statute of which this is a branch, is the most ancient<sup>st</sup> Statute Law we have, won and sealed in former times, that it hath been 29 solemnly confirmed in Parliament.

**H.** Impositions were in some sort done *Consensu Mercatorum*, by  
K k 2 Edward



*Rott. Almain.*  
3 E. 3. *Rott.*  
*Rott. Claus.*  
29 Ed. 1. Ex-  
tract Braxelles.

*Dors. Claus an.*  
16 Hen. 3. m. 20.

*Rott. Claus.*  
31 Ed. 2.

32 Ed. 3. *Memb.*  
32. in *dors Rott.*  
*Almaine.*

The Parliament  
having justly,  
honourably and  
voluntarily  
humbly presented  
such and many more who are established on his Majesty according to their several limitations.

*Claus. Anno*  
3 Ed. 3.

*Original.* 17. Ed.  
3. *Rott.* 2.

*Vide the great*  
*Cafe in Mich.*  
4. Jac. in the  
Exchequer ver-  
sus Bates. Lane  
Rep. fo. 22.

*Edward the First, and Edward the Third: And again in Henry the Eighth, of which the House of Burgundy complained as against the Treaty of Entercourle.*

King Henry the Third finding that such a *Modus* of Imposition tended to the destruction of Trade, and apparent overthrow of Commerce, and was against the Great Charter, made Proclamation Anno 16 in all Ports of England, That all Merchants might come *faciendo rectas & debitas consuetudines nec sibi timeant de malis solis*, for that such Impositions had no better name then *Malevolts*.

The like was declared and done by *Edward the First* in the 25th year of his Reign, and *Edward the Second*, in the 11th and 12th years of his Reign.

III. In 2 Ed. 3. the Great Charter for free Traffique was confirmed; and about some 3. years after there were Commissioners granted for the raising of a new kind of Tillage, but the people complained, whereupon the Commissions were repealed, and he promised never to assels any but as in the time of his Ancestors.

But this Prerogative Power of Imposing inward and outward upon Commodities over and above the ancient Custome of Subsidy without a free consent in Parliament, is now ceast and settled; And that Question which for many Ages had been handled by the most Learnedst of their times, in the asserting and in the denying, will never more be remembred: Which being managed for sometime was afterward farmed out: The like having been do-

ne by former Kings, as did *Edward the third* with the New and Old Customes of London for 1000 Marks monthly to be paid unto the Wardrope.

*Richard the Second, Anno 20.* Farmed out the Subsidy of Cloth in divers Countries.

So *Edward the 4th, Henry the 8th, Queen Elizabeth, and King James*, the same having been used in former Ages even in the best govern'd State, *Rome*, which let out Portions and Decim's to the *Publicans*.

IV. The Old *Hanse Towns*, viz. *Lubeck, Collen, Brunswick, Dantzick*, and the rest, had extraordinary Immunities granted unto them by our Third Henry, for their great assistance and furnishing him in his Warrs and Naval Expeditions with so many Ships; and as they pretended the King was not onely to pay them for the Service of their Ships, but for the Vessels themselves in case they miscarried: The King having concluded a Peace, and they being

on their return home for *Germany*, the most considerable part of their Fleet miscarried by storm and stress of weather; for which according to Covenant they demanded reparation: The good King in lieu of that which he wanted, *Money*, granted them divers Immunities; and amongst others, they were to pay but 1. per Cent. Customs, which continued till Queen *Mary's* time, and by the Advice of King *Philip* she enhanced the 1. to 20 per Cent: The *Hans* not only complained, but clamoured aloud for breach of their Antient Priviledges confirmed unto them by long Prescription from 13 successive Kings of *England*, and the which they pretended to have purchased with their Money: King *Philip* undertook to accommodate the business, but Queen *Mary* dying, and he retiring, nothing was effected. Complaints being afterwards made to Queen *Elizabeth*, she answer'd, *That as she would not innovate any thing, so she would protect them still in the Immunities and Condition she found them.* Hereupon their Navigation and Traffique was suspended a while, which proved very advantageous to the *English*, for they tryed what they could do themselves herein, their adventures and returns proving successful, they took the whole Trade into their own hands, and so divided themselves to Staplers and Merchant-adventurers: the one residing constant at one place, the other keeping their course and adventuring to other Towns and States abroad with Cloth and other Manufactures: This so nettled the *Hans*, that they devised all the ways that a discontented people could to draw upon our new Staplers or Adventurers the ill opinion of other Nations and States: but that proving but of too small a force to stop the Current of so strong a Trade as they had got footing into, they resorted to some other; whereupon they applied themselves to the Emperour, as being a Body incorporated to the Empire; and upon complaint obtained Ambassadors to the Queen to meditate the business: but they returned still *re infecta*: Hereupon the Queen caused a Proclamation to be published, *That the Merchants of the Hans should be intreated, and used as all other Strangers within her Dominions in point of Commerce, without any mark of distinction.*

This enflamed the more, thereupon they bent their Forces more eagerly, and in an Imperial Dyet at *Ratisbone* they procured that the *English* Merchants who had associated themselves in Corporations both in *Embsden* and other places should be adjudged *Monopolists*; whereupon there was a Comital Edict procured against them that they should be exterminated, and banished out of all parts of the Empire; which was done by *Suderman* a great Civilian. There was there at that time for the Queen as nimble a man as *Suderman*,

and he had the Chancellor of *Embsden* to second him, yet they could not stop the Edict, whereby our new erected Society of Adventurers were pronounced a Monopoly: Yet *Gilpin* played his Cards so well, that he prevailed the *Imperial Ban* should not be published till after the Dyet; and that in the interim his Imperial Majesty should send an Ambassador to *England* to advertise the Queen of such proceedings against her Merchants. But this made so little impression on the Queen, that the *Ban* grew rather ridiculous than formidable, for the Town of *Embsden* harboured our Merchants notwithstanding, and afterwards the Town of *Stode*; but the *Han-siatiques* pursuing their revenge, and they being not so able to protect them against the *Imperial Ban*, removed and settled themselves in *Hamburg*.

This Politique Princes in recompence of their revenge commanded another Proclamation to be published, That the *Han-siatique* Merchants should be allowed to Trade into *England* upon the same Conditions as they formerly did, Provided the *English* Merchants might have the same Priviledges to reside and Trade peaceably in *Stode* or *Hamburg*, or any where else within the Precincts of the *Hans*. This so incensed and nettled them, That all endeavours were made to cut off *Stode* and *Hamburg* from being Members of the *Hans*, or of the Empire: But the design was suspended till they saw the success of 88, King *Philip* having promised to do them some good Offices in the Concern.

But the Queen finding that the *Hans* were not contented with that Equality she had offered to make betwixt them and her own Subjects, but were using such extraordinary means; put forth another Proclamation, That they should transport neither Corn, Victuals, Arms, Timber, Masts, Cables, Metals, or any other Materials or Men to *Spain*, or *Portugal*. And not long after the Queen growing more redoubled and Famous by the Overthrow of King *Philip's* Invincible Armada, (as the Pope Christned it) the *Hans* began to despair of doing any good, especially they having about some 60 Sayl of their Ships taken about the River *Lisbon* by her Majesties Frigats; that were laden with *Ropas de contrabanda*. She notwithstanding had thoughts of discharging this Fleet by endeavouring a reconciliation of the differences: but she having intelligence of an Extraordinary Assembly at *Lubeck* which had purposely met to consider of means to be revenged of her, she thereupon made absolute price of those 60 Sayl; onely two were freed to carry home the sad Tydings of their Brethrens misfortune. Hereupon the *Pole* sent a ranting Embassador in the behalf of the *Hans*, who spake the

In-

Injuries done to the *Huns* in a high tone. But the Queen her self suddenly answered him in a higher, with a satisfaction no greater than what she had done to others of the like quality before.

This fortunate Clashing for the 19. *per Cent.* on the Customs, has proved ever since advantageous for *England*, our Merchants have ever since beaten a peaceful and an uninterrupted Trade into *High* and *Low Germany*; and by their constant Trade in those Parts have found a way through the *White Sea* to *Arch-Angel* and *Mosco*. The return of all which hath since vastly encreased the *Riches* and *Strength* of this Nation.

V. After the *Jews* became Tributary to *Rome*, (which was acquir'd by *Pompey* Treescore years before the Birth of our Saviour) certain officers or Commissioners were appointed by the *Romans* in all those places where their Victorious Standards had claimed a Conquest, who used to appoint such Officers or Commissioners to Collect and gather up such Custom-money or Tribute as was exacted by the Senate. Those that gathered up these Publicque payments were termed *Publicani Publicanes*, and by reason of their cruel and Oppressive Exaction, they became hateful in all Nations.

Every Province had his several Society or Company of *Publicans*; Every Society his distinct Governour: in which respect it is that *Zaccheus* is called by the Evangelists, *Princeps Publicanorum*, the chief Receiver of the Tribute, or chief Publican; And all the Provincial Governours in these several Societies had one chief Master or Superintendant residing at *Rome*, unto whom the other subordinate Governours gave up their Accounts. These Publicans were hated of all the *Roman* Provinces, but especially of the *Jews*, because though it was chiefly maintained by the *Galileans*, yet it was generally inclined unto by the *Jews*, That Tribute ought not to be paid by them. This Hatred is confirmed by the Rabinal Proverb, *Take not a Wife out of that Family wherein there is a Publican, for such are all Publicans*. Yea, a Faintful Publican was so rare at *Rome* it self, that one *Sabinus* for his honest managing of that office, in an Honourable remembrance thereof had certain Images with this Inscription, *Καλῶς ποιοῦντα*, For the Faithful Publican. No marvel that in Holy Writ Publicans and Sinners go hand in hand.

But now the World has been so long used to them, that in all or most Nations the particular Princes or States chuse out the most Sagest and Prudentst men for that Employment: And certainly the Customs of this Realm never did return to that great and clear Account as they have done under the Care and Prudent management

*Joseph. locutus de Pompeio, lib. 7. de Bello Jud. cap. 5. pag. 720.*

*Sigon. de Antiq. Jure Civium Rom. lib. 2. Cap. 4.*

*Luke 13. 2.*

*Jf. Causabon, Exercit. 3. 37.*

*Sutton. in Flav. Vesp. c. 1.*

*Tertullian*  
(Printed 1609.)  
*judic. Cap. 9.*

ment of the present Commissioners: And were *Tertullian* alive, he would have Recanted that Opinion of his, *That none would be Pub-  
lican but a Heathen.*

VI. Customes are Duties certain and perpetual payable to the King as the Inheritance of his Crown, for Merchandizes transported from and beyond the Seas from one Realm to another. *Magna Custuma* & *antiqua* is payable out of Native Commodities, *silices*, Wool, Woolfels and Hides, and what is certain imposed.

And this Custome which is called *Magna Custuma*, is due to the King of Common Right for four Causes:

1. For leave to depart the Kingdom, and to carry Commodities out of the Realm out of it.

2. For the Interest and Dominion which the King hath in the Sea, and the Arms thereof.

3. Because the King is the Guardian of the Ports within the Realm, & *Custos totius Regni.*

4. For Wharfrage and Protection of Merchants upon the Seas against the Enemies of the Realm and Pyrats.

VII. The Custome which is called *Parva Custuma*, is a Custome or Duty payable by Merchants Strangers, and begun in the time of King *Edward the First*, when they granted him, that they would pay to him and his Heirs 3 *d.* in the pound for all Merchandizes Exported and Imported by them, &c. And that the Charter was and may be of great Use, I have here inserted the same, as it is Faithfully Transcribed out of the Roll in the *Tower*.

*Eliz. Dyer*  
165.

For



Pro Mercatoribus Alienigenis, de Libertatibus eis concessis.

**R**EX, Archiepif. &c. Salutem. Circa bonum statum omnium Mercatorum fubfcriptorum, Regnorum, Terrarum, & Provinciarum, videlicet, Alemann, Francie, Hispanie, Portugalie, Navarre, Lombardie, Tuscie, Provincie, Catholonie, Ducatus nostri Aquitanie, Tholofan, Tatureini, Flandr, Brabant, & omnium aliarum terrarum, & locorum extraneorum quocunque nomine ceñfentur, venientium in Regnum nostrum Anglie & ibidem cōfervantium.

Non parva cura follicitat, qualiter fub noſtro dominio tranquillitatis, & plenae ſecuritatis immunitas iſdem Mercatoribus futuris temporibus prepararetur: ut itaque bona ſuorum reddantur ad noſtra, & Regni noſtri ſervicia promptiora; iſtorum petitionibus favorabiliter annuentes, & pro ſtatu eorundem plenius aſſecutendo, in forma que ſequitur ordinantes ſubſcripta, dictis Mercatoribus pro nobis, & heredibus noſtris in perpetuum durantiis concedenda.

Imprimis, Videlicet, quod omnes Mercatoribus dictorum Regnorum & terrarum ſalvo, & ſecure ſub tuitione & protectione noſtra in dictum Regnum noſtrum Anglie & ubique infra poteſtatem noſtram alibi veniant cum Merch-

*For Merchant Strangers concerning Liberties granted to them.*

**T**HE KING, to his Archbishops, &c. ſendeth Greeting. Concerning the good Condition of all the Merchants of the Kingdoms, Lands, and Provinces underwritten: That is to ſay, *Germany, France, Spain, Portugal, Navarre, Lombardy, Tuscany, Provence, Catholonia; Our Dukedoms of Aquitaine, Tholom, Turen, Flanders, Brabant,* and all other Lands, and forein places, by what name ſoever called, coming into Our Kingdom of *England*, and there remaining.

We being very ſolicitous, out of Our eſpecial Care, that under Our Dominions, a freedom of Tranquility, and full Security for the ſaid Merchants may be provided for the future, ſo as they may the more readily apply themſelves to the ſervice of Us, & of Our Kingdom. We graciously answering their Petitions, & ordaining more amply for ſecuring their Condition in form following underwritten, are pleaſed to the ſaid Merchants for Us and Our Heirs for ever.

*Imprimis, That is to ſay, That all Merchants of the ſaid Kingdoms, and Lands, may come from any other place, ſafe and ſecure under Our Tuition and Protection into Our ſaid Kingdom of England; and every*

L!

where

31 Ed. 2. num.  
44. hinc.

(a) Repairing  
public Walls.

(b) Bridges.

(c) Pavements.

where within our Dominion,  
with their Merchandizes of what  
sortsoever, and be unmolested,  
and quiet concerning (a) Mura-  
ge, (b) Pontage, and (c) Pa-  
vage, and that within Our said  
Kingdom, and Dominion, they  
may Traffique in the Cities, Bo-  
roughs and Market Towns, oie-  
ly in gross, as well with Natives,  
or Inhabitants of this Our King-  
dom and Dominion aforesaid,  
as with Strangers Forreign and  
Domestick; But so as they  
wheresoever vulgarly called Mercery  
or the SPICES trade, they  
may sell by retail, as formerly  
hath been accustomed. And  
that all the said Merchants may  
carry, or cause to be carried  
whither they please, their Mer-  
chandize which they have  
brought into Our said Kingdom,  
and Dominion, or otherwise ac-  
quired: Except to the Lands of  
the manifest and notorious En-  
emies of Our Kingdom, paying  
the Customs which shall be due:  
Which onely excepted, which  
shall not be exported out of Our  
said Kingdom or Dominion, af-  
ter they have been imported into  
Our said Kingdom, or Domi-  
nion, without Pleasure and spe-  
cial License, by any way or me-  
ans whatsoever.

disse suis ambuscatures, in  
Muris, Pontage, & Pavage,  
liberi & quieti quousque ultra  
idem Regnum & Dominium  
nostrum, in Civitatibus,  
Burgis & Villis, Mercator-  
ibus possint mercari, & trans-  
ingrosso tam cum Indigenis  
sem Incolis quam cum Regni  
& potestatis nostre predictae,  
quamcumque Alienigenis, venientibus  
vel pibatis. Ita tamen quod  
Merces que vulgaribus Mercor-  
ibus, vocantur ac Species, min-  
us vendi possunt: prout an-  
tea fieri consuevit: Et quod  
omnes predicti Mercatores  
Merchandises suas quousque ip-  
sos ad predictum Regnum &  
Potestatem nostram adducere,  
seu infra idem Regnum & po-  
testatem nostram carry, vel  
aliter ad quocumque locum pos-  
sint que voluerint, tam infra  
Regnum & Potestatem no-  
stram predictam, quam extra  
ducere, proutquam ad terras  
amicarum, & non ad terras  
hostium Regni nostri, sed ad  
conversaciones quas debuerint,  
Vitis donec exceptis que de  
eodem Regno, seu potestate no-  
stra, postquam facta in idem Rey-  
num, seu potestatem nostram  
ducta fuerint, sine voluntate  
nostra & licentia specialis, non  
liceat eis eorundem quousque mo-  
do.

Item, quod predicti Mercatores,  
in Civitatibus, Burgis  
predictis non voluntate sua  
hostiari valeant, & mox illis

his rationem hanc, ut de-  
tum ipsorum, quousque fuerit  
hospitia sive domus.

Item, quod quilibet Contractus per ipsos Mercatores cum quibuscunque personis, unde-  
cunque fuerit, super quocun-  
que genere Merchandise, un-  
ius firmus sit & stabili, ita  
quod neuter Mercatorum ab illo Contractu possit discede-  
re, vel resilire, postquam dona-  
rius Dei inter principales par-  
tes contractus,actus fuerit  
& receptus. Et si forsan su-  
per contractu huiusmodi con-  
tentio orietur, fiat inde proba-  
tio ante Inquisitionem secundum  
alias, & consuetudines feris-  
simas, et bellarum ubi dictum  
contractum fieri contigerit,  
& tunc.

Item, promittimus prefatis  
Mercatoribus pro nobis, &  
hereditibus nostris, in perpetuum concedentes, quod nolum  
prisam vel arrestationem, seu  
dilationem occasione preise de  
cetero de mercimoniis, Mer-  
chandisiis, seu aliis bonis suis per  
nos, vel alium, seu alios, pro  
aliqua necessitate vel casu, con-  
tra voluntatem ipsorum Mercato-  
rum aliquatenus faciemus, aut  
fieri patiemur; nisi statim solu-  
to precio pro quo ipsi Mercato-  
res aliis huiusmodi mercimonia  
vendere possint, vel eis alias sa-  
tisfactio fiat quod reputant se con-  
sentos, & quod super mercimo-  
niis, merchandisiis, seu bonis ip-  
sorum per nos, vel ministros

with their Goods, to the con-  
sent of them who entertain them;

Item, That every Contract

made by the said Merchants with  
what persons soever, and from  
what places soever, for what kind  
of Merchandise soever, shall  
be firm and stable, so that nei-  
ther of the Merchants shall de-  
part from, or go back from his  
bargain, after a Gods penny is  
given and received, between the  
principal persons contracting;  
and if it happen that a Contention  
arise on the said Contract,  
there shall be a Tryal, or Inqui-  
sition, according to the Usages  
and Customs of the Fairs; and  
Towns where such contract shall  
be made or begun.

Item, We promise to the afo-  
resaid Merchants, and for Us,  
and Our Heirs for ever, give,  
That We by no means what-  
soever will make, nor suffer to  
be made any Prize, or Ar-  
rest, or detention by occasion  
of Price, for the future, up-  
on their said Wares, Mer-  
chandizes, or other their Goods  
by Us, or by any other, or o-  
thers in any case, and necessity  
whatsoever, against the will of  
the said Merchants, without the  
price presently paid, for which  
the said Merchants might sell to  
others, wares of the like sort for,  
or otherwise to satisfy them, so as  
they shall reput themselves con-

tented. And that no Appraisalment or value shall be put upon the said Merchants Wares, Merchandizes, or Goods, by Us or Our Ministers,

nostros, nulla appreciatio, aut estimatio imponetur.

*Item*, We will, That all Bayliffs; and Officers of Fairs, Cities, Boroughs, and Market Towns, shall do speedy Justice to the said Merchants complaining to them, from day to day, without delay, according to the *Merchants Law*; concerning all and every thing which by the said *Law* may be determined: And if any defect shall happen to be found in any of Our Bayliffs or Ministers aforesaid, whereby the said Merchants or any of their Factors shall suffer loss, although the Merchant recover his losses against the party in the whole; Yet nevertheless, the Bayliff, or other Ministers of Ours as the fault requires shall be punished; and We grant the said punishment in favour of the Merchants aforesaid, for completing their right.

*Item*, That in all kinds of Pleas, saving in the case of Crime, for which the pain of Death is liable to be inflicted, where the Merchant shall be impleaded, or be implead another, of whatsoever condition he that is impleaded be of, whether a Forraigner or a Domestick, in the said Fairs, Cities or Boroughs, where is a sufficient plen-

*Item*, *Columus quod omnes Ballivi, & Ministri ferrarum, Cebitarum, Burgorum, & Villarum Mercatoriarum, mercatoribus ante dictis conquerentibus eorum eis, celerem justitiam faciant de die in diem sine dilacione, secundum LEGEM MERCATORIAM, de universis & singulis que per eandem Legem poterunt terminari. Et si forte inveniantur defectus in aliquo Ballivo, vel ministro eorum predictorum, unde istos Mercatores, vel eorum aliquos istius incommoda sustinerint, vel sustinuerit, licet Mercator, versus partem in principali recuperaverit dampna sua, nichilominus Ballivus, vel minister alius versus eos, prout delictum erigit, puniatur, & satisfactionem assent. concordantibus in favorem mercatorum predictorum, pro eorum justitiaturanda.*

*Item, quod in omnibus generibus placitorum, salvo in criminis pro qua indigentia sit poena mortis, ubi Mercator implacitatus fuerit vel alium implacitaverit, ejusdemque conditionis item implacitatus existens, errationis vel perversus, in quovis Civitatibus, sive Burgis ubi fuerit sufficiens copia Mercatorum predictorum terrarum, & In-*

& Inquisitio fieri debeat, in  
mediis Inquisitoris de eisdem  
Mercatoribus, & mediis alteris  
de alijs probis & legalibus homi-  
nibus loci illius, ubi placitum il-  
lud esse contigerit. Et si Mercatoribus dictarum Terrarum  
numerus non sufficiatur suffi-  
ciens, ponatur in Inquisitione  
illi quod idonei invenerint ibi-  
dem, & residui sint de probis  
hominibus, & idoneis, de locis in  
quibus placitum illud erit.

Item, Volumus, Ordinamus & Statuimus, quod in  
qualibet Villa Mercatoria,  
& Civitate Regni nostri predicti,  
& alibi infra potestatem no-  
stram, Pondus nostrum in dictis  
locis ponatur, & ante pondera-  
torem statetur in presentia  
Emptoris & Venditoris hucus  
viseatur, & quod pondus sine  
equalitate, & ex tunc ponderator  
ponderet in equali, & cum  
Statorem posuerit in equali,  
statim moveat manus suas ita  
quod remaneat in equali, quod  
que per totum Regnum, & pote-  
statem nostram unam sit pondus  
& una mensura, & signum Standar-  
di nostri signetur, & quod quilibet  
posse habere Statorem unum  
Quarteroni & infra, ubi contra  
Dominium loci, aut libertatem  
petit non, Antecessores nostros  
concessam illud non fuerit, & sic  
contra villarum aut Terrarum  
consuetudinem hactenus obser-  
batam.

Item, Volumus, & concedi-  
mus quod aliquis certus ho-

ty of Merchants of the Lands a-  
foresaid, and Inquisition there  
ought to be made: Half of the  
Inquisition shall be of the said  
foreign Merchants, and the other  
half of honest and lawful  
men, where the Plea happens to  
be: And if a sufficient number  
of the Merchants of the said  
Lands shall not be found, let the  
rest be put in the Inquisition who  
shall be found fit in that place,  
and let the residue be of other  
good and fit men, in the places in  
which that plaint shall be.

Item, We will, Ordain, and  
appoint, That in every Market  
Town and Fair of Our said  
Kingdom, and elsewhere within  
in Our Dominion, Our Weight  
is to be put in a certain place, and  
before weighing thereof, the  
Scale to be empty in the presence  
of Buyer and Seller, and the  
arms thereof to be equal, and  
when he hath set the Scale equal,  
he is forthwith to take off his  
hands, so that it may remain  
equal: And that throughout Our  
whole Kingdom and Dominion,  
there be one Weight and Mea-  
sure, both of them sealed with  
the sign of Our Standard, and  
that every one may have a Scale  
of one Quarteroni and under:  
where contrary to the said place,  
or Liberty by Us, or Our Ance-  
stors, was not granted, or con-  
trary to the Custom of the Vil-  
lages and Fairs hitherto observed.

Item, We will and grant, That  
some certain faithful and discreet







with *Avair-dupais*, Weights, and in other fine Goods, as in *leq. 23. of Cloth of Tawen*, of Silk, of *Cordons*, of Hair, and in divers other Merchandises, in Horses, also, and other Animals, Corn, and other Wares and Merchandises of different sorts, which cannot easily be put to a certain rate of Custom: The said Merchants have consented to give Us and Our Heirs for ever Twenty shillings Estimation and value of those Wares and Merchandises, by whatsoever name they be called three pence in the pound, upon the Entrance of their Wares and Merchandises into Our Kingdom, and Dominion aforesaid, within twenty dayes after such Wares and Merchandises shall be brought into Our Kingdom, and Dominion aforesaid, and there shall be laden, or sold. And likewise three pence for every twenty shillings at the Exporting of what kind soever of Wares or Merchandises bought in Our Kingdom, and Dominion aforesaid, besides the ancient Customs formerly given to Us or to others. And over and above the value and estimation of the said Wares and Merchandises for which three pence for every twenty shillings as aforesaid are to be paid; they are to have credit by the Letters, by them to be produced from their Principals or Partners, and if

de alietis ponderis, et de aliis rebus, sub illis sicut de pannis, barbis, de serico, de cordatis, de seta, et aliis diversis mercibus, et de equis etiam, ac aliis animalibus Blado, et aliis rebus, et Merchandis, nullatenus, quoad certam Customam sive pondum poterunt, item Effectores concesserunt nos, Nobis, et heredibus nostris de quolibet libra argenti estimationis sive baloris recte, et Effectores ipsorum quocunque modo transmittentes demum de libra in introitum rectum, et Effectores ipsorum ipsorum in Regnum, et Portum nostrum predictum infra viginti dies, postquam fuerint ad nos, et Effectores in Regnum, et Portum nostrum adducti, etiam eadem remittere, que debent fuerint; Et Similiter transmittentes de quolibet libra argenti introductione quatuordecimque rectum, et Effectores ipsorum huiusmodi emptorum in Regnum, et Portum nostrum predictum, ultra Customam antiquam nobis, aut aliis antedatas. Et super balore et estimatione recte et Effectores ipsorum huiusmodi, de quibus recte debent de quolibet libra argenti sicut predictum sunt solvendi; credatur eis per litteras quas de Dominis aut locis suis ostendere poterunt, et si litteras non habuerint, sicut in hac parte ipsorum Effectores si prestatos fuerint, vel ballores ipsorum in eodem Effectores absentis iuramentis.

Licet

*Licet in super Sociis de Societate Mercatorum predictorum infra Regnum, et Potestatem nostram predictam, lanes vendere aliis sociis suis, et similiter emere ab eisdem absque Custumia solvenda; ita tamen quod dictæ Lane ad tales manus non deveniant, quod Custumia nobis debita defraudetur.*

Et præterea est sciendum, quod postquam sepedicti Mercatores semel in uno loco infra Regnum et Potestatem nostram Custumiam nobis concessam superius, pro Merchandis suis in forma solverint supradicta et siam habeant inde Warrantum, erunt liberi et quieti in omnibus aliis locis infra Regnum, & Potestatem nostram predictam, de solutione Custumie huiusmodi pro eisdem Merchandis, seu mercimoniis per idem Warrantum, sive huiusmodi Merchandis infra Regnum, & Potestatem nostram remaneant, sive exterius deferantur, Exceptis vinis, que de Regno et Potestate nostra predictis, sine voluntate et licentia nostra sicut predictum est, nullatenus educantur.

Volumus autem ac pro Nobis & Heredibus nostris concedimus, quod nulla exactione, Price vel

they have none, Let it be determined in this case, by the Oaths of the said Merchants, or in their absence, of their Servants.

Moreover, It may be lawful for the Society of the Merchants aforesaid; to sell Wooll to the fellows of the said Society, and likewise to buy the same one of another within Our Kingdom and Dominion, without payment of Custom: Provided that the said Wooll come not to such hands whereby we may be defrauded of Our Customs.

And furthermore be it known, That after the said Merchants have once in any one place within Our Kingdom and Dominion paid our Customs granted, as aforesaid, to Us, for their Merchandizes in form aforesaid, and thereupon they have their Warrant, they shall be free, and unmolested in all other places within Our Kingdom and Dominion, from payment of the said Custome for the same Commodities or Merchandizes by the said Warrant, whether such Merchandizes remain within our Kingdom, and Dominion, or are carried out, Except Wines, which without Our leave or licence, as aforesaid, are by no means to be Exported out of Our Kingdom.

We will also, and for Us, and Our Heirs grant, That no Exaction, Price or Loan, or any other

Mm

**Pressatio**, aut aliquod aliud onus super personas Mercatorum predictorum merchandizas seu bona eorundem aliquatenus imponatur, contra formam expressam superius, et concessam.

other burden shall be imposed in any part or measure on the persons of the said Merchants, their Merchandizes, or Goods contrary to the form before expressed and granted.

**Hic testibus venerabilibus** Patribus Roberto Cantuariensi Archiepiscopo totius Angliæ Primatæ, Waltero Coventrie et Litch Episcopo, Henry de Lacy, Comite Lincoln. Humfrido de Bohun Comite Hereford. & Essex, ac Constabular. Angl. Adomar, de Valencia, Galfrido de Geynvil Hugone de Spencer, Waltero de bello Campo Senescallo Hospitalis nostri, Roberto de Bures et aliis. Dat. per manum nostram apud Westm. primo die febr.

Witness hereto, The Reverend Fathers Robert Archbishop of Causerbury Primate of all England, Walter Bishop of Coventry, and Lichfield, Henry de Lacy Earl of Lincoln, Humphrey de Bohun Earl of Hereford and Essex, and Constable of England, Adamars of Valentia, Galfrid of Geynvil, Hugh de le Spencer, Walter de bello Campo Chamberlain of Our Houle, Robert of Bures, and others, Given by Our Hand at Westminster the First day of February.

Sir John Davies  
in the Case of  
Customs.

VIII. Subsidy is a duty payable for Merchandizes Exported and Imported, granted by Act of Parliament for the life of the King. And are,

1. Aysd and Subsidies payable out of Native Commodities Exported and Imported.

2. *Tunnage*, which is a subsidy out of Wines of all sorts: and *Poundage*, which is a subsidy granted out of all Commodities Exported and Imported, except Wines and ancient Staple Commodities, and is the 20th part of the Merchandize, Imposts or Duties payable for Merchandizes rated and assessed by Parliament; and then they are in the nature of Subsidies imposed by the Kings Prerogative.

The Rates are generally agreed on by the Commons House of Parliament, and are expressd in a Book commonly called the *Rates of Merchandizes*; that is to say, the Subsidy of Tunnage and Poundage, and the Subsidy of Woollen Cloaths or old Drapery, and are subscribed with the hand of the Speaker.

IX. All Merchant-Strangers bringing in any sort of Wines, are to pay Thirty shillings in the Tun over and above the Rates which the

Vide the Stat.  
12. Car. 2. of  
Tunnage and  
Poundage.



the Natives pay, including Twenty shillings the Tun formerly paid to His Majesty by the name *Southampton Duties*, for all Wines of the growth of the *Levant*; for which sort of Wines, the Stranger is also to pay to the use of the Town of *Southampton* for every Butt or Pipe Ten shillings.

Aliens are likewise to pay the Ancient Duty of Butlerage, which *Vide in tit. Prifage.*  
is 2 s. per Tun.

*Rule, That all such Wines as shall be landed in any of the Our-Ports. and Custome paid, and afterwards brought to the Port of London by Certificate, shall pay so much more Customs as they paid short of the Duty due in the Port of London.*

For every Tun of Beer to be Exported in shipping English built money must be paid Two shillings: And for every Tun of Beer Exported in any other shipping in money six shillings:

*Directions o Tunnage.*

X. If there shall happen to be brought or carried out of this Realm any Goods lyable to the payment of Custome and Subsidy which are omitted in the Book of Rates, or are not now used to be brought in or carried out, or by reason of the great diversity of the value of some Goods could not be Rated; That in such case every Customer or Collector for the time being, shall and may levy the said Custome and Subsidy of Poundage according to the value and price of such Goods to be affirmed upon the Oath of the Merchant in the presence of the Customer, Collector, Comptroller and Surveyor, or any two of them.

*Directions in Poundage.*

XI. Every Englishman shall pay for every short Cloth containing in length not above 28 Yards, and in weight not above 64 l. white or coloured by him to be shipped and carried out of this Kingdom, Three shillings four pence, being after the rate of two farthings and half a farthing the pound weight.

*Directions for the payment of the Subsidy upon Woollen Clothes or old Drapery.*

And so after that rate for all other sorts of Clothes of greater length and weight, allowing not above Twenty eight yards, and sixty four pound to a short Cloth; that is to say, for every pound weight over and above sixty four pound, two farthings and a half farthing; and for all other sorts of lesser Cloathes to be allowed to a short Cloth that is to say, every Stranger shall pay for every short Cloth *cont* in length not above 28 yards, and in weight not above 64 l. white or coloured by him to be shipped or carried out of this Kingdom, Six shillings eight pence, besides the old duty of one shilling and two pence.

And so after that rate for all other sorts of Clothes of greater length and weight; and for all sorts of lesser Clothes to be allowed to a short Cloth: That is to say.

*Dorset and Somerset Dozens, Rudge washes, Cardinals, Pin-whites,*

*whites, Straits, Statutes Stockbridge, Tavestock*, seven of each sort be allowed to a short Cloth.

*Taunton, Bridgwaters, and Dunbars*, the 5. not exceeding 64 l. in weight; *Devon*. Dozens containing 12 or 13 yards, in weight 13 l. Five to be allowed to a short Cloth.

Ordinary *Penny-stones*, or *Forrest Whites* cont' between 12 or 13 yards, and in weight 28 pounds, *Shorting Pennystones* cont' 13 or 14 yards, and in weight 35 pounds unfreized, Four to be allowed to a short Cloth.

Narrow *Yorkshire Kerfies* whites and Reds cont', not above 17 or 18 yards, and in weight 22 pound. *Hampshire* Ordinary Kerfies, *Newberry* whites, and other Kerfies of like making cont' 24 yards, and in weight 28 l. *Sorting Hampshire Kerfies* cont' 28 pound, and in weight 32 pound; Three of them to make a short Cloth.

Northern Dozens, single sorting *Pennystons* cont', between 13 and 15 yards, and in weight 53 pound Frized, Two of them to make a short Cloth.

And the Northern Dozens double; one to be accounted for a short Cloth.

All which shall go and be accounted for short Clothes, and shall pay after the rate of short Cloth before rated, and for over weight 2. farthings and one half the pound.

The New sort of Cloth called the Spanish Cloth, otherwise Narrow List, Western Broad Cloth not exceeding 25 yards in length, and 43 pounds in weight, to be accounted two thirds of the short Cloth before rated.

And for every pound weight exceeding 43 pounds, two farthings and half a farthing the pound weight.

Cloth Rashes *alias* Cloth Serges cont' 30 yards weighing 40 pounds, to be accounted two thirds of the short Cloth before rated.

And for every pound exceeding 40 pound weight, two farthings and half a farthing the pound weight.

And for any other sort of Woollen Cloth of the Old or New Drapery, and not mentioned in that Book, to pay two farthings and half a farthing the pound weight; And for any other sort of Woollen Cloth of the Old or New Drapery and not mentioned, is to pay 2 farthings and half a farthing for the Subsidy of every pound thereof.

## CHAP. XIII.

## Of Impositions Subsequent, Conditional, Temporary, &amp;c.

I. *Of Impositions on the Manufactures of France by Lex talionis.*

II. *On Vinegar, Perry, Cider and Rape, Customs payable by Denizens and Strangers, and Logwood made importable.*

III. *On Ships that have not two Decks, and 16 Guns.*

IV. *On Sale, Beer, Cider, Perry, Vinegar, a further Duty.*

V. *Of the Duty called Coynage, and upon what impos'd; and the Temporary Imposition called the Additional Duty.*

VI. *Of Goods particular Imported by Aliens; And Rules for petty Customes and other matters relating to Duties.*

VII. *Of Aliens Customs on Fish and other Commodities, and rates upon the same.*

VIII. *Impositions on Forraign Liquors, and Rates on the same.*

IX. *Of Native Commodities, and such as were formerly prohibited may be transported, paying certain Duties.*

X. *Beer, &c. Exported; Skins, Leather or &c. Transportable, paying such Duties—Bulloign and Coya only excepted.*

XI. *Of Spices Importable by any Nation.*

XII. *Of Great and lesser Officers Fees, and of Goods not paying one pound Custom in or out, what Fees to be taken.*

XIII. *Voluntary Gifts from some esteemed no Bribes; and Rates about payment of Fees.*

XIV. *Of Allowances for Tary, what.*

There are several Duties imposed subsequent to the Duties payable by the Book of Rates, and over and above the same; That is to say, on all Ships belonging to the French King's Subjects, which shall lade, or unlade any Goods in this Kingdom, or set on shore or take in any Passenger, to pay 10 s. per Tun; This was an *Oliver* for a *Rowland*, the French King having done us the like kindness, by imposing the value of 50 *Solz* on every *English* Ship; this compliment lasts but 3 weeks longer then the French Kings; his remov'd, ours drops.

II. So likewise on Vinegar, Perry, Rape, Cider, and Cider-eager imported from Forraign Parts per *English*, shall answer Six pounds ten shillings per Tun; if by Strangers, then but six pounds.

But if they shall Export, then Three pounds ten shillings per Tun shall be repaid to the *English*, and Four pounds fifteen shillings to be repaid to Strangers.

The Statute of *Elizabeth* Cap. prohibiting the Importation of Logwood Repealed; and the same may be Imported paying 1 l. per Tun; and in case of Exportation, then to be repaid 4 l. per Tun.

Subsequent Impositions to the A of Tunnage and Poundage, and the Book of Rates.

12 Car. 2.

This Collected as the Tunnage and Poundage is directed.

14 Car. 2.

cap. 11. For preventing of Fraud.

14 Car. 2.

cap. 11.

14 Car. 22. 11.

III. The Parliament taking likewise again into consideration the encouragement of Trading in Ships of force, have imposed on all Goods and Merchandise Imported and Exported, from and to the Mediterranean Sea, beyond *Malaga*, in any Ship that hath not two Decks and 16 Pieces of Ordnance mounted, and two men to each Gun, to pay over and above the Rates imposed by the Book of Rates one *per Cent*; This does not extend to Ships laden with Fish, or half laden with Fish and other Commodities.

V. So likewise on Salt out of *Scotland* into *England*, one half-penny *per Gallon*.

18 Car. 2.  
cap. 5.22 Car. 2.  
cap. 3.

Again, There is imposed on Wines, Vinegar, Cider, and Beer, Ten shillings *per Tun*; and on Brandy and Strong Waters 20 s. *per Tun*. For the Coinage Duty, the moneys that arises on this Duty is to be paid at the Customs-House to the Collectors and other Officers, to be by them kept apart from all other Moneys, and paid Quarterly into the Exchequer without Salary or Fee: The Goods are forfeitable for non-payment of this Duty; and the same is to be repaid if the Goods are transported within one year.

There is likewise an Imposition of 1. *per Tun* on *Spanish Wines*, and 8 l. *per Tun* on *French Wines* and Vinegar; but that is but temporary, and ends the 24th of *June* 1678.

*Per Act of Nav.*  
12 Car. cap. 18.  
*Vide* the Statutes and the particular Commodities enumerated there.

*Rule.*

VI. There is also Duties payable by Aliens for Goods Imported in Aliens Ships, commonly called *Navigation Duties*.

So likewise all Goods of the growth, production or Manufacture of *Muscovia* or *Russia*, and also of *Turkey*.

*Note*, That in all cases where petty Customs inwards is payable, it is to be understood of the fourth part of the full Subsidy according to the rates and value in the Book of Rates before the 5. *per Cent.* is deducted

*Rule.*  
*Vide* the Table of Strangers Duties upon wines.

14 Car. 2. *Vide*  
Table of *French*  
wines.Act of Navigation;  
12 Car. 2. cap. 18.Act of Trade  
15 Car. 2. cap.7. *Vide* Stat. and  
the particulars  
enumerated.

*Note*, Wines of all sorts Imported are to pay Aliens Duties.

*Note*, That the Nett Subsidy of Vinegar, Perry, Rape, Cyder, and Cyder-cage both in *London* and out Ports, is the same with the Subsidy of *French* wines, payable in *London*.

VII. So likewise there is a further Imposition called Aliens Customs for a Fish, Fish Oyl, Blubber, Whalebone, or Whalefins, nor being caught in Vessels belonging to *Englishmen*, are to pay double Strangers Customs.

So likewise Customs and Impost to be paid for several sorts of salted or dried Fish not imported in Ships *English* built, or belonging to *England*, and not having been stilled and caught in such Ships.

Upon which ACT, *Nass*, That the 5. *per Cent.* is not to be allowed out of the Petty Customs.

VIII. The-

VIII. There is likewise an Excise or Impost upon Forraign Liquors imported; That is to say, Beer or Ale 6 s. *per* Barrel; Cyder or Perry the Tun ten shillings; Brandy or Strong Waters perfectly made 8 d. *per* Gallon. 12 Car. 23, 24.  
22 Car. 2. 4.

If any of those Goods be landed before those Duties be fully paid and warrants signed, and without presence of an Officer, they are forfeited, the Informer half. 15 Car. 2.  
cap. 11.

XI There is likewise Duties imposed on several Commodities Exported by several Acts of Parliament subsequent to the Act of Tunnage and Poundage.

Coals Transported in *English* Shipping and Navigation for his Majesties Plantations in lieu of all Custome, shall pay onely for one Chaldron of *New-Castle* Measure 1 s. 8 d. For one Chaldron *London* Measure 1 s. Provided good Security be given for landing the said Coales accordingly. Act for Trade;  
15 Car. 2. cap. 7.

There are likewise several Native Commodities and Mattle prohibited by divers Acts of Parliament not to be Transported unless sold under such prices; but *non obstante* they may now be Exported, paying Custome according to the Book of Rates. Act for Tillage,  
22 Car. 2. cap. 3.

X. There is likewise an Imposition on Beer, Ale and Mun to be Exported, to pay 1 s. *per* Tun and no more; But this is but *tempore* for 6. years. 22, 23 Car. 2.  
20 Car. 2. 5.

So likewise Leather of all sorts, Sheep-skins, Calve-kings, Tanned or dressed, *non obstante* any former Law, paying for each hundred weight *cont'* 112 l. weight one shilling and no more: This ends in the 25<sup>th</sup> of *March*, 1675. and both of them to the end of the next Sessions of Parliament after. 20 Car. 2. 5.

Likewise all sorts of Forraign Coyn or Bullion of Gold or Silver may be Exported without paying any Duty or Fee for the same, *en-try* being first made in the Custome-House; the like for Diamonds, precious Stones, Jewels, and Pearls of all sorts. Act for Trade;  
15 Car. 2. 7.

XI. All persons whatsoever may Import from any place beyond Sea in *English* Ships, Mace, Nutmegs, Cynamon, Cloves, into *England*, *Wales*, *Fersey*, *Guernsey*, paying the Customes thereof. Provided before the lading thereof they give notice to the Commissioners or Farmers of the Customes of the quantity & quality they intend to lade, with the name of the Vessel in which they intend to 1663. But see 14. Car. 2. concerning Customes. \* Sir Francis Moor's Report, 224. Lord Cobham's Case. The like not long since adjudged in the *Common Pleas* (on a Special Verdict found at *St. Edmunds-Bury* in *Suffolk*) about *Mich.* 25. or *Hill* 25, & 26. Car. 2. Proclam. Car. Regis, 20 Dec. 1662. 26 Aug.

import the same, and procure a Licence under the hands of the said



said Farmers or Commissioners, or any 3 of them for the Importing of the same.

*Note*, If Goods are Wreck't, and the Lord seizes them, yet thy ought not to pay Custome. \*

XII. Fees and Allowances due and payable to the Officers of his Majesties Customes and Subsidies in the Port of London, and the Members and Creeks thereunto belonging; That is to say, to the Officers of the Petty Customes Outwards, Subsidy, Outward, Petty Customes Inwards, Subsidies Inwards, Great Customes, Clerks fees Inwards and Outwards, the Kings waiters being in number Eighteen, the Register of the Kings warrants, the Ulster of the Custome-House, Gaugers of French Vessels, Chief Searcher, and his Majesties five Under-Searchers in the Port of London; and the two Searchers at *Gravefend*, were all set and entred in a Table; the same was settled by the Commons House of Parliament, and signed by the Right Honourable Sir *Edward Turner* now Lord Chief Baron of his Majesties Court of *Exchequer*, and then Speaker to the Commons House of Parliament; at which time the Question being put, That for all Goods not paying one pound Custome in or out, there shall be but half Fees taken for all Cocquets, warrants, Debentures, Transires or Certificates; It was Resolved in the affirmative.

*Veritate cujus-*  
*dam Ordin. 2*  
*Dom. Com. Sab-*  
*bati 17. Maii,*  
*14 Car. 2. Regis.*

XIII. Societies or Companies Trading in a joynt stock, and making but one single Entry, the Adventurers being many, the Table of Fees does not hinder: but the Officers may and waiters receive such gratuity as the Company shall voluntarily give.

All Goods under the value of 5 l. in the Book of Rates paying Subsidy the sum of 5 s. or less, shall pass without payment of Fee.

*English* Merchants that shall land out of one Ship at one time (although the receipt of the Subsidy be distributed into several Offices) shall not pay any more than for a single entry.

The Goods of Partnership to pass as if the propriety were in one single person.

Fifth by *English* in *English* shipping or Vessels inwards or Outwards all along the Coast to pay no Fee.

Post Entries inward to pass without Fee under five shillings; if above five shillings and under forty shillings, then six pence: but if the Custome to be paid exceed 40 s. then full Fees.

The Merchant shall pay for all Goods opening that shall be short entred above 10 s. Custome.

The Merchant shall pay for weighing of all Goods shall be short entred above 20 s. Custome.

The

The Merchant is not to be at any charge if duly Entred.

XIV. There is likewise to be allowed to the Merchants a certain abatement called *Tare*, for Goods and Merchandize; the which is reduced into a Table, and cannot be deviated from in any case within the Port of *London*, without special direction of the Commissioners or Farmers; or in their absence of the consent of the General Surveyours, and Surveyour of the ware-house, or of two of them at the least, whereof the Surveyor of the Ware-house to be one; and in the Out-Ports not without the consent and advice of the Collector and Surveyor: or where there is no Surveyor, by the Collector himself: giving speedy notice to the Commissioner or Farmers of the reason of so doing.

There and That, the first is the weight of the Cask, or Bale or Covering wherein goods are packed; the other is a consideration allowed in the weight for empyeing and reselling the Goods.

## CHAP. XIV.

Of Scavage, Package, Portorage, Ports, Members, Creeks, the Port of *London*, and places lawful to lade and unlade in.

- I. Scavage what, where payable, and to whom.
- II. Who pay the same, and how regulated and governed.
- III. Goods omitted in the Scavage Table of Rates, how to pay.
- IV. Of Package, how govern'd, and where payable.
- V. Where Strangers shall pay as of old.
- VI. Of Packers, water-side Porters, what Duties Strangers are to pay for shipping out their Goods.
- VII. Of Ports, Members and Creeks;

what are meant and understood by them as in reference to action, lawful or unlawful.

- VIII. The several Ports, Members and Creeks in England and Wales.
- IX. Of the Extent of Port of *London*.
- X. Of the several Keys Wharfs, and other places lawful for landing of Goods.
- XI. What Goods are excepted which may be shipped or Landed at other places.

I. **S**avage in an ancient *Toll* or *Custom* exacted by Maiors, Sheriffs, &c, of Merchant Strangers for Wares shewed or offered to sale within their precincts, which is prohibited by the Statute of 19 *H.7* cap. 8. in a Charter of King *Henry* the Second to *Canterbury*, it is written *Secutina*.

The City of *London* still retain the Custom, of which in an old printed Book of the Custom, of *London* it is there mentioned, and how to be disposed, of which Custom, *Walten del apertrecht* to the *Sheriffs*, and the other halfen del to the *Hospes* in who-

se houses the Merchants been lodged: And it is to be noted that  
 the same is the reason by cause that Merchants between Customs  
 men ought to be taken care that any which unto the Officers  
 Merchandises of the there be sold, &c.

22 H. 8. cap. 8

The *Scavage* that is taken consists of two parts, that which is  
 payable by Denizens, and that which is required of Aliens; And  
 that all persons subject to such Duties might not be imposed upon,  
 there are Tables mentioning the particular Duties set up and approved  
 by the Lords Chancellor, Treasurer, President, Privy Seal, Ste-  
 ward, and two Justices of the Kings Bench and Common Pleas;  
 and by them subscribed, or any four of them at least: The which  
 Duties are on Goods Inwards and Outwards.

1er Order in  
 K. Charles the  
 First, subscribed  
 by William Lord  
 Bishop of Lon-  
 don, H. Earl of  
 Manchester,  
 Lord C. J.  
 Brampton, and  
 Lord Littleton.

III. *Note.* All Goods mentioned in the table of *Scavage*, and  
 not mentioned in the Table of Rates, shall pay after the rate of  
 one penny in the pound, according as they are expressed or valued  
 in his Majestie's Book of Rates, and all others not expressed therein  
 shall pay the same Rates according to the true value.

*Note.* That all private Baulks 8 Inches square and upwards, are  
 by the 13 Article annexed to the Book of Rates reputed Timber, and  
 valued at 3 d. the foot, 50 Foot making one Load, the value of which  
 is 12 s. 6 d. and the Subsidy for one Load of one penny, or one half  
 penny and half one farthing, out of which the 5 per Cent. is to be  
 deducted.

IX. The is likewise another Duty called *Package*, the which is  
 likewise set and rated in a Table, and the which is taken of all the  
 several Commodities therein mentioned.

All Goods not mentioned in that Table are to pay for *Package*  
 Duties after the rate of one penny in the pound, according as they are  
 expressed or valued in his Majesties Book of Rates, and all others  
 not expressed therein shall pay the same rate according to their true  
 value.

For every Entry in the Packer's Book for writing Bills to each en-  
 try outward as usually they have done, 12 d.

The Strangers are to pay the labouring Porters for making up their  
 Goods at their own charge, as always they have done.

Strangers are likewise to pay the Water-side Porters belonging  
 to the Package Office such Fees and Duties for Landing and Ship-  
 ping their Goods, as they usually have done within these 10 years.

The Packers Water-side Porters have Tables of Duties for  
 landing of Strangers Goods, and for the shipping out their Goods;  
 and Goods not mentioned in the Table are to pay Portage Duties as  
 other Goods do of like Bulk or condition therein expressed.

VII. Port

VII. Port or *locus Publicus* are those places to which the Officers of the Customs are appropriated, and which contain and include all the Priviledges and guidance of all Members and Creeks therunto allotted.

*Portus qui publicus non solum mercibus exonerandis inservit, sed ut hanc ibi tutum receptaculum habeant, & jure debito ac securitate firmantur Navigantes, quatenus innocuum iter & stationem querant. Hinc Portus & Navalia Privilegiis publicis gaudent. Arg. 1 Leg. Statut. D. de flum. cap. 2. jur. Nautic. Sued. C. 1. §. 1. 4. H. 4. 20.*

By *Members* are those places where anciently a Customhouse hath been kept, and Officers at their Deputies attending, and are lawful places of Exportation or Importation.

*Creeks* are places where commonly Officers are or have been placed by way of prevention, not out of duty or right of attendance, and are not lawful places of Exportation or Importation without particular Licence or sufferance from the Port or Member under which it is placed.

VIII. \* The several Ports and Members as now they account at the Customhouse, are;

*Portus qui publicus non solum mercibus exonerandis inservit, sed ut hanc ibi tutum receptaculum habeant, & jure debito ac securitate firmantur Navigantes, quatenus innocuum iter & stationem querant. Hinc Portus & Navalia Privilegiis publicis gaudent. Arg. 1 Leg. Statut. D. de flum. cap. 2. jur. Nautic. Sued. C. 1. §. 1. 4. H. 4. 20.*

*\* Portus est closus locus quo Importantur merces & exportantur. l. 59. de verb. Sign. Alias fatio, quod ibi tunc raves stare possint, leg. 1. §. 13. D. de sum.*

Ports.	Members.	Creeks.
London		Gravesend.
		Leigh.
	Malden.	Burnham.
		West Mersey.
		East Mersey.
Ipswich.	Colchester.	Brickley.
		Wivenhoe.
		Maintree.
		Harwich.
	Woolridge.	
Yarmouth.	Albionburgh.	Oxford.
		Dunwick.
	Seewald.	Walderswick.
		Leffoe.
	Blackney and Cley.	





Ports.

Members.

Creeks.

Charisle.	{	West Marches,
		containing the Coast of Cumberland, bordering on Scotland.
Whitehaven.	{	Workington.
		Ravenglas.
		Millicorpe.
Lancaster.	{	Pyte of Fowdrey.
		Graunge.
Boulton.	{	Wyrewater.
		Preston and Ribbles Water.
Liverpool.	{	Sankey Bridge.
		Eradsam.
		South shoar of the River of Mersey to the Red Stones.
Chester.	{	Hillbree.
		Dawpoole.
		Neston.
		Burtonhead.
		Raghill.
		Mostin.
Alberconway.		
Bewmaris.	{	Holyhead.
		Amlogh.
Carnarvan.	{	Pulbolly.
		Barmantle.

Ports.	Members.	Creeks.
	<i>Aberdovy.</i>	<i>Abernstah.</i>
<i>Milford.</i>	<i>Cardigan.</i>	<i>Newport.</i>
		<i>Fiscard.</i>
	<i>Pembroke.</i>	<i>Haverford West.</i> <i>Tenby.</i> <i>Carmarthen.</i> <i>Lanelthy.</i> <i>North Burrys.</i>
<i>Cadise.</i>	<i>Swansey.</i>	<i>South Bourrys.</i> <i>Neath or Britton.</i> <i>Ferry.</i> <i>Newton.</i>
		<i>Aberbaw.</i> <i>Penarth.</i> <i>Newport.</i> <i>Chepstow.</i>
<i>Glocester.</i>		<i>River Severn from</i> <i>Bridge-North to</i> <i>Kink-Road.</i>
<i>Bristol.</i>		<i>Pill.</i> <i>Upbill.</i>
<i>Bridgewater</i>	<i>Minhead.</i>	

Ports.

Members.

Creeks.

Plymouth.

{	Padstow.	_____	
	St. Ives.	_____	
	Pensance.	_____	
	Helford.	_____	
	Falmouth.	_____	{ Pemen. Stonehouse. Trow.
	Fowey.	_____	
{	Lowe.	_____	
	_____	_____	{ Salisb. Stonehouse. Cowland.

Exeter.

{	Ilfracomb.	_____	
	Barnstable.	_____	{ Clovelly. Appledore. Biddisford.
	_____		{ Tincomb. Starcross. Beare and Scaton. Topham. Pauldrum. Sydmouth.
			{ Lympson. Exmouth. Aylmouth.
	{	Dartmouth.	Salicomb. Brixham. Torbay. Totnes.

Ports

Ports.

Members.

Creeks.

Poole.

{	Lynes. ———	{	Pridport.
		{	Charmonsh.
{	Weymouth. ———	{	Portland.
		{	Lalworth.

Southampton.

{	—————	{	Swanidge.
		{	Wareham.
	Cowes ———	{	Christchurch.
		{	Hinnington.
{	—————	{	Yarmouth.
		{	Newport.
	Portsmouth. ———		Emsworth.

Chichester.

{	Arundell.	{	Pagham Point.
		{	Selfcy.
	Shorham. ———		Brighton.
{	Lewis. ———	{	New Haven.
		{	Seafort.
	Pemsey. ———		—————
	Hastings. ———		—————
{	Rye. ———	{	Winchelsea.
		{	Lyd.
		{	Rumsey.
	Hymb. ———		—————

Ports

Ports	Members	Creeks
<i>Dover.</i>		
		<i>Deal.</i>
		<i>Romsgate.</i>
		<i>Margat.</i>
<i>Sandwich</i>		<i>Whistable.</i>
	<i>Feversham.</i>	
	<i>Milton.</i>	
	<i>Rocheſter.</i>	<i>Quinborough.</i>

*Note.* All the Ports and Havens in England are *infra Corpus Comis*, apud the Court of Admiralty cannot hold Jurisdiction of any thing done in them. *Hollands Case*, Earl of *Exeter*, 30 *H. 6.* And because he held Plea in the Admiralty of a thing done *infra Portum de Hull*, damages were recovered against him 2000 pounds. *Vide Mich. 12 Jac. C. B. Green v. yvers Barber Godbolt* 260, 271.

*IX.* In regard that the Port of *London* is of great concern as in relation to the Customs, the extent and limits of the same Port is by the *Exchequer* settled, which is declared to extend and be accounted, from the Promontory or Point called *North-Foreland* in the Isle of *Thanet*, and from thence *Northward* in a supposed line, to the opposite Promontory or Point called the *Naze*, beyond the *Gunfleet* upon the Coast of *Essex*, and so continued Westward thorough the River of *Thames*, and the several Channels, Streams, fluminis quo ambitur, pectigalis quod ex Navium statiane penditur, est Publicus et a. c. n. s. t. u. r. §. 2. Inst. de ver. a. i. 1. 4. §. de cod. e. un. qua sunt Regal. and Rivers falling into it, to *London-Bridge*, save the usual and known right liberty and Priviledge to the Ports of *Sandwich* and *Ipswich*, and either of them, and the known Members thereof, and of the Customers, Comptrollers, Searchers, and other Deputies of and within the said Ports of *Sandwich* and *Ipswich*, and the several Creeks, Harbours, and Havens to them or either of them respectively belonging within the Counties of *Kent* or *Essex*.

*X.* And in regard that when Ships did come up to the Port of *London*,

*Ad Portus*  
inflationem, quia  
publica milita-  
tis gratia fit, om-  
nes subditi loci  
conferre operas  
debent. l. 7. C.  
de oper. pub.  
Portus intuitu  
hodie Regalibus



*London*, there used to be very great Frauds, committed by a promiscuous kind of shipping and landing of Goods and Merchandizes at several blind or unknown Wharfs and Keys, by reason of which His Majesty was often defeated of his Customs, it was provided that a Commission might issue forth out of the *Exchequer* to ascertain all such Wharfs, Keys, or other places as his Majesty by virtue of such Commission should appoint, in pursuance of which His Majesty hath been pleased to allow to be lawful Keys, Wharfs, and other places for the lading or landing of Goods:

*Brewers Key*

*Chester Key.*

*Wool Dock.*

\* *Customhouse.*

*Key.*

\* Some Stairs on the West side thereof is declared not to be a place for shipping or landing of Goods.

*Porters Key.*

*Beak Key.*

† *Sabbis Dock.*

† Excluding the Stairs there, which are declared no lawfull place for shipping, or landing of Goods or Merchandize.

*Wiggens Key.*

*Yonges Key.*

*Ralphs Key.*

\* *Dice Key.*

\* The Stairs there declared unlawfull for shipping or landing Goods or Merchandize.

*Smart Key.*

† *Somers Key.*

† The Stairs there declared no lawfull place for shipping and landing of Goods and Merchandizes.

*Eyon Key.*

*Burolph Warfe.*

*Hemons Key.*

\* *Gannet Key.*

\* The Stairs on the East declared unlawful for shipping or landing of any Goods.

*Cocks Key.*

One other place betwixt *Cocks Key* and *Fresh Wharfe*, called part of *Fresh Wharfe*, the Stairs are declared to be unlawful for shipping or landing of any Goods, &c.

*Fresh Wharfe.*

Billing Gate.

To be a common open place for the landing or bringing in of Fish, Salt, Victuals, or Fuel of all sorts, and all Native Materials for Building, and Fruit (all manner of Groceries excepted,) and for carrying out of the same, for no other Wares or Merchandize.

Bridgehouse in Southwark.

May be allowed a place convenient for landing of any kind of Corn bought or provided for Provision or Victualling of the City of London, and not upon any private or particular persons account, and for no other Goods or Merchandize.

XI. It may be lawful for any person to ship or lade into any Ship or Vessel on the River the *Thames* bound over Seas, Flories, Coals, Beer, Ordinary Stones for Building, Fish taken by any of his Majesties Subjects; Corn or Grain, the Duties being paid. and Coaquets and other lawful Warrant duly passed for the same.

So likewise Deal Boards, Balke and all sorts of Masts and Great Timber may be unshipt and laid on Land at any place between *Lymehouse* and *Westminster*, the Owner first paying or compounding for the Customs, and declaring at what place they will land them before he unships them; and upon Licence had and in the presence of an Officer they may unlade them; otherwise they incur a forfeiture.

O O 2

CHAP.

## CHAP. XV.

## Provisions and Allowances made notwithstanding the several Clauses in the Acts for the Customs.

- I. Customs, to be paid for no more than is landed; and when Bulk shall be broken.
- II. Of Goods imported and exported, what of the Customs shall be repaid back, and by whom; and of the thing requisite in the same.
- III. Of Agreements or Contrasts made, or to be made for the importing and exporting by way of Composition ratified.
- IV. What Allowances to be made to the Exporters of Wines.
- V. Of Exporting of Spanish Wooll; where the same may be done.
- VI. Of Currencies Exported, what Allowances shall be made, and to whom; as well to Denizens as Forreiners.
- VII. Goods imported not finding Market after a year. Wines exported discharged of Customs.
- VIII. What Allowances are to be made for Leakage.
- IX. What shall be accounted Leakage.
- X. Wines proving unmerchandizable, what Allowances to be made.
- XI. Tobaccos receiving detriment or damage in the Importation, what Allowances to be made.
- XII. Strangers paying double Subsidy, where they shall pay double Custom.
- XIII. Of times and places lawful to unlade, and Officers Duties then attendant to be present.
- XIV. York, New-Castle, and Hull men where Custom-free; and for what.
- XV. Exeter and other Western men, what Free Subsidies shall be allowed in.
- XVI. Woollen where new or old, what Allowances shall be made in Custom or Subsidy.
- XVII. Allowances of 5 in the Hundred for all other Goods.
- XVIII. The Customs and other Officers Duties in reference to attend their several Duties in the Customs.
- XIX. Of Officers their Duties, and the punishments where made on complaint.
- XX. The Several Duties of London how preserved.
- XXI. Thelike for other Cities for these Duties granted or taken for publick good uses.
- XXII. Where Ships may be visited, and the Officers duty relating to the same.
- XXIII. Timber to be rated; and in what manner must pay.
- XXIV. Prevention in Extortion of Customs and Officers; and on what pains and penalties.
- XXV. Where Fees for Cogsheets and Certificates shall be paid altogether, and where he shall detain his own Cogsheet till the Vessel has broke ground.
- XXVI. Where the Officers and Customs shall allow and make good to the Merchants the Alger Duty, and no other Allowances, and no other Imposition or Duty required by the Book of Rates shall be required or paid.
- XXVII. If Goods shall happen to be taken by enemies or Pyrats, or wreckt, and what Allowances shall be paid.
- XXVIII. Ships of War and other privileged Vessels subject to search.
- XXIX. Of Allowances to be made, and of Shipping out lesser quantities than is contained in the Certificates, what operation the same hath.

I Every

**E**VERY Merchant shall have free liberty to break Bulk in any Port allowed by Law, and to pay Custom and Subsidy for no more then he shall enter and land: Provided that the Master or Purser of every such Ship shall first make declaration upon Oath before any two Principal Officers of the Port of true contents of his Ships lading, and shall likewise after declare upon his Oath, before the *Customs, Collection, Comptrolers, Surveyors*, or any two of them, at the next Port of this Kingdom where his Ship shall arrive, the Quantity and Quality of the Goods landed at the other Port where Bulk was first broken, and to whom they did belong.

*Vide. cap. 4.*  
what are lawful  
places of land-  
ing.

A Merchant brought 80 Tun of Bay Salt by Sea to a Port in *Eng-land*, and out of that ship sold 20 Tun, and discharged the same *Port*; but the 20 Tun were never actually put on shoar, and for the rest being 60 Tun the Master agreed for the *Customs*, and put them on land; and although that 20 Tun was always water-born and never were put on shoar, yet adjudged they ought to pay; the reason was, for the discharging them out of the Ship amounts as much as to the laying them on Land, the same being done in Port; for otherwise the King would meerly be defrauded. But if a Ship is carried in by storm, and to preserve the Vessel part is landed before the Duty paid, yet will not subject the same to a forfeiture.

*Cook. 12 part.*  
fol. 17, 18.

**II.** All Foreign Goods and Merchandizes (except Wines, Currans, and wrought Silks) first Imported, shall be again Exported by any Merchant *English* within in 12 moneths, and such Merchant and Merchants as shall export any such Foreign Goods or Merchandizes (except as before is excepted) shall have allowance be repaid by the Officer which received the same, the one moiety of Subsidy, which was paid at the first importation of such Goods or Merchandizes; or any part thereof, so as due proof be first made by Certificate from the Officers of the due entry and payment of the Custom and Subsidy of all such Foreign Goods and Merchandizes inwards with the Oath of the Merchants importing the same, affirming the truth thereof, and name of his Majesties Searcher, or Under-Searcher in the Ports of *London*, and of the Searcher of any other the out Ports, testifying the shipping thereof to be exported; after all which duly performed in manner before expressed, the moiety of the Subsidy first paid inwards, shall without any delay or reward be repaid unto such Merchant or Merchants who do export such Goods and Merchandizes, within one moneth after demand thereof, as also the whole additional duty of *Silk, Linen and Tobacco* as before is directed.

*Forass's case.*  
*Plowden.*  
Com. fol. 9.

44. H. 7.

If the Officer shall refuse to pay, (admitting there was no Relief had by way of complaint) whether the Merchant Exporter may not bring an Action against him upon the Debt created in law, as he that hath a Tally may do.

III. And if there be any Agreement now in force, which was formerly made by the late Commissioners of the Customs and Subsidies, with the Merchants, Strangers, or their Factors, or shall hereafter be made by any Commissioners or Farmers of the Customs and Subsidies, or any other power (except by consent of Parliament) with any Merchant or Merchants Strangers or Factors for any Foreign Goods and Merchandizes, to be brought in to the Port of London, or any other Port or Haven of this Kingdom of England, or Principality of Wales, and to be exported again by way of Composition; all other Merchants being his Majesties Subjects shall be admitted into the same Composition, and not to be excluded from any other privilege whatsoever, granted to the stranger by any private agreement or composition, under the same Condition and with the same Restriction as shall be made with the Merchant Stranger.

IV. Every Merchant (as well English as Stranger) that shall ship and export any kind of Wines which formerly have paid all the duties of Tunnage inwards, shall have paid and allowed unto them all the Duties of Tunnage paid inward, except to the *Englishman* 20s. per Tun, and Stranger 25 s. per Tun, upon due proof of the due Entry and payment of Tunnage inwards; and of the shipping thereof to be Exported to be made as above.

V. If any Merchant, Denizen, or Stranger shall Export any Spanish or Foreign Wool, he shall have liberty so to do with this further condition, That such Spanish or other Foreign Wools whatsoever be not Exported in any other Ship or Vessel whatsoever, with intent to be arrived beyond the Seas out of the Kingdom of England and Dominion of Wales, then only in English Shipping, upon pain of confiscation.

VI. Every Merchant (as well English as Stranger) which shall Ship or Export any Currans, which formerly were duly entered and paid the Subsidy and Custom inwards, shall have allowed and repaid unto them respectively all the Custom and Subsidy paid inwards for the same, except 1 s. 6 d. for every Hundred weight to the English, and 1 s. 3 d. and one half penny for every Hundred weight to the Stranger, upon due proof of the due Entry and payment of the Custom and Subsidy thereof inwards, and of the Shipping thereof to be Exported to be made as in the second Article.

VII. If

2 Car. 2. cap.

32.

14 Car. 2. cap.

13.



**VII.** If any Merchant having duly paid all Duties inward for Foreign Goods, and in regard of bad sales shall be enforced to keep the same or any part thereof in his hands after the space of a Year shall be elapsed; in this case he or any other person is to be permitted to ship the same out for parts beyond the Seas if they think fit, without payment of any Subsidy for the same outwards, upon due proof that the same was duly entered and Subsidy paid inward.

**VIII.** Every Merchant bringing in any sort of Wines into this Kingdom by way of Merchandise, and shall make due Entries of the same in the Customhouse, shall be allowed 12. per Cent. for Leakage.

**IX.** Every Hogshead of Wine, which shall be run out and not full seven Inches, shall be accounted for out, and the Merchant to pay no Subsidy for the same.

And by some it is conceived that the Freight shall be paid for the same, but the Merchant may sling them up to the Master for Freight; but that should seem hard, for *non est* any fault in the Master, but the same may be in the Cask, or in the ill stowing (the Master by custome having no charge of the stowing of Wines, especially *French*; but the same belongs to certain Officers beyond the Seas from whence they are imported.) Besides, the Goods (be they empty or full) take up Tunnage in his Ship, and should all the Wines a Shipboard have the same misfortune, it would seem hard; however, it is pty Opinion in this case should amount to a laudable Custom.

**X.** If any Wines shall prove corrupt and unmerchantable, and fit for nothing but to distil into hot Waters or to make Vinegar, then every Owner of such Wines shall be abated in the Subsidy according to such his damages in those Wines by the discretion of the Collectors of the Customs, and one of the Principal Officers.

**XI.** If any Tobacco or other Goods or Merchandise brought into this Kingdom shall receive any damage by salt water or otherwise, so that the Owner thereof shall be prejudiced in the sale of such Goods, the principal Officers of the Customhouse, or any two of them, whereof the Collector for the time being to be one, shall have power to choose two indifferent Merchants experienced in the values of such Goods, who upon visiting of such goods, shall certify and declare upon their corporal Oaths first administered by the said Officers, what damage such Goods have received, and are lessened in their true value, and according to such damage in relation to the Rates set on them in the Book of values, the Officers

are

Boyce versus  
Cole &c.  
Cole jun. Hill.  
27 Car. 2. in  
B. Z.

There is a Book  
at the Custom-  
house, in which  
there is a general  
value set on all  
Goods, amongst

which Tobacco  
is there valued.  
Nor can such  
Merchants  
Strangers land  
their Goods be-  
fore they have  
agreed for the  
Customs, not  
withstanding  
*Charta Mercat-  
oria*.

\* *Vide lib. 3.  
cap. 14. § 10.*

are to make a proportionable abatement unto the Merchant or Owner of the Subsidy for the same.

XII. All Merchant Strangers, who according to the rates and values set in the general Book of Values and Rates, and do pay double Subsidy for Lead, Tin Woollen Cloth, shall also pay double Customs for Native Manufactures of Wool; and the said Strangers are to pay for all other Goods as well inwards as outwards, rated to pay the Subsidy of Poundage, three pence in the pound, or any other Duty payable by *Charta Mercatoria*, besides the Subsidy.

XIII. That the Merchants Trading into the Port of London have free liberty to lade and unlade their Goods at any lawful Keys and places of shipping and lading of Goods, between the Tower of London, and London Bridge, and between Sun-rising and Sun-setting from the Tenth day of September, to the Tenth day of March; and between the hours of six of the Clock in the Morning, and six of the Clock in the Evening, from the Tenth day of March, to the Tenth of September, giving notice thereof to the respective Officers appointed to attend the lading and unlading of Goods; and such Officer as shall refuse upon due calling to be present, he shall forfeit for every default, the one moiety to the King, the other to the party aggrieved, he suing for the same.

XIV. The Merchants of York, Kingston upon Hull, and Newcastle upon Tyne, Norriern Clothes and Kerries in ten to be shipped in those Ports in the name of Double Wrappers, as formerly has been there allowed them.

XV. The Merchants of Exeter and other Western parts shall be allowed free of Subsidies for one *Perpetuum* in Ten for a Wrapper, and three *Devonish Dzens* in Twenty for Wrappers, the same to be shipped out of the Ports of Exeter, Plymouth, Dartmouth, Barnstable, Lyn Regis, or the Members thereof.

XVI. All Merchants Transporting any sort of Woollen whether new or old Drapery, as also all Bayes and Cottons, shall be allowed one in ten for a Wrapper, free of Custom and Subsidy.

XVII. Every Merchant shall be allowed upon all other Goods and Merchandize appointed to pay to any the Subsidy of Poundage according to the Rate in the Book of Values, to be Imported, in the Hundred of all the said Subsidies of Poundage so appointed to be paid.

XVIII. The Officers, who sit above in the Customhouse of the Port of London, shall attend the service of their several places from 9 to 12 of the Forenoon: and one Officer or one able Clerk, shall attend with the Book in the Afternoon, during such time as the Officers

*Note*, That all these several allowances are not by Act of Parliament, but purely his Majesties gracious and voluntary gift and benignity towards the encouraging the Merchants and Trade.

cers are appointed to wait at the Waterside, for the better deciding of all Controversies that may happen concerning Merchants Warrants. All other the Officers of the Out-Ports shall attend every day in the Customhouse of every respective Port for dispatch of Merchant and Ships between the hours of 9 and 12, and 2 and 4 in the Afternoon.

XIX. Every Merchant making an Entry of Goods either inwards or outwards, shall be dispatched in such Order as he cometh; and if any Officer or his Clerk shall either for favour or reward put any Merchant or his Servant duly attending and making his Entries as aforesaid, to draw any other Reward or Gratuity from him then is limited in the Act of *Tunnage and Poundage*, and the general Book of Values, if the Master Officer be found faulty herein, he shall upon complaint to the Chief Officers of the Customhouse be strictly admonished of his Duty; but if the Clerk be found faulty therein, he shall upon complaint to the said chief Officers be presently discharged of his Service, and not permitted to sit any more in the Customhouse.

XX. The Lord Maior, Commonalty, and Citizens of the City of London, their Officers or Deputies for and touching Offices of *Package, Scavage, Baleage or Portage* of any Goods or Merchandize of Aliens, or their Sons born within this Kingdom or unfreemen, Imported or Exported into or out of the City of London, or the Liberties or Ports thereof, unto or from the Ports beyond the Seas; for or concerning the receiving or taking of any Fee or Rates heretofore usually taken, for or in respect of the said Offices, or any of them might and may receive and take the same, any thing in the Act of *Tunnage and Poundage*, or any other Act or thing to the contrary notwithstanding.

XXI. All ancient Duties heretofore lawfully taken by any City or Town Compare, their Farmers, Deputies or Officers, under the name of Town Custom or the like, for the maintenance of Bridges, Keyes, Harbours, Wharfs; or the like, shall and may be received and enjoyed as formerly, any thing in the said Act, or any other Act to the contrary in any wise *non obstante*,

XXII. The Under Searcher or other Officers of *Gravesend* have power to visit and search any Ship outward bound, but shall not without just and reasonable cause detain any Ship under colour of searching the Goods therein laden above 3. Tydes after her arrival at *Gravesend*, under pain of loss of their Office, and rendering damage to the Merchant and Owner of the Ship, and the Searcher

or Officer of the Customhouse in any of the out-Ports having power to search and visit any Ship outward bound, shall not without just and reasonable cause detain such Ship under colour of searching the Goods therein laden above one Tyde after the said Ship is fully laden and ready to set sail, under pain of loss of the Office of such offender, and rendering damage to the Merchant and Owner of the Ship.

XXIII. All Timber in balks which shall be of 8 inches square or upwards that shall be imported or brought from any part beyond the Seas into the Realm of *England*, Dominion of *Wales*, Port and Town of *Berwick*; or any of them, shall be rated according to the measure of Timber the foot square 3 *d.* for the value thereof, and according to that rate shall pay for Subsidy 12 *d.* in the pound according to Poundage; and all under eight inches square, and above 5 inches square, shall pay for Subsidy according to the Rates mentioned in the Book of Rates for middle Balks, and all of 5 inches square or under shall pay according to the rate of small Balkes.

XXIV. For avoiding of all oppressions by any the Officers of the Customs in any Port of this Kingdom, in exacting unreasonable Fees from the Merchant by reason of any Entries or otherwise touching the shipping or unshipping of any Goods, Wares Merchandize, it is ordered, That no Officer, Clerk, or other belonging to any Customhouse whatsoever, shall exact, require, or receive any other or greater Fees of any Merchant or other whatsoever, then such as are or shall be established by the Commons in Parliament assembled; if any Officer or other offend contrary to this Order, he shall forfeit his Office and place, and be for ever after incapable of any office in the Customhouse.

XXV. All Fees appointed to be paid unto the *Customer*, *Comptroller*, *Surveyor*, or *Surveyor General* in the Port of *London*, for any Cocquets or Certificate outwards, shall be paid altogether in one sum to that Officer from whom the Merchant is to have his Cocquet or Certificate above in the Customhouse; and after the Merchant hath duly paid his Custom and Subsidy, and other duties above in the Customhouse, as is appointed above by the Book of Rates, he is to be master of and keep his own Cocquet or Certificate until he shall ship out his Goods so entred; when as he is to deliver the same to the *Head Searcher*, or his Majesties *Under-Searcher*, in the Port of *London* or other Ports, together with the mark and number of his Goods.

XXVI. The Officers of Customhouse for the time being shall allow and make unto all persons all such Moneys as are or shall be due unto them for the half Subsidy, and also the *Algier* Duty of Foreign Goods formerly Exported now due and unpaid. The

The Duties and Sums of Money appointed to be paid by the Act of Tonnage and Poundage passed this Parliament, and by the Book of Rates therein mentioned, and no other shall be paid to his Majesties Officers during the continuance of the said Act upon Goods imported and exported, any Law, Statute, or Usage to the contrary notwithstanding. Nevertheless the duty of *Prizage* and *Butlerage*, and the duty of 12 *d.* of every Chaldron of Sea-Coal exported from *Newcastle* upon *Tyne* to any other Port of Ports of of this Realm, shall be continued.

XXVII. If any Merchant Denizon born shall happen to have his Goods and Merchandize taken by Enemies or Pirates at Sea, or perished in any Ship or Ships, the duties being either paid or agreed for, upon due proof thereof may ship out of the same Port the like quantity as shall amount unto the Custom, without paying of any thing for the same. 27 Ed. 3. cap. 13. 12 Car. 2. cap. 2.

If the Importer shall pay ready money, shall be allowed 10 *per Cent.* for so much as he shall pay down.

XXVIII. Ships of War may be entred and searched for prohibited and uncustomed Goods, and to bring them ashore to the Kings Warhouses, and the Commissioners or Head Officers may leave aboard Officers to look after him, that none be unladen or imbezelled, on pain of forfeiture of 1000 *l.* And if Goods are concealed a shipboard after such time as the Ship is cleared, to forfeit 100 *l.* and then any with a Writ of Assistance out of the Court of *Exchequer* to go in the day time to any place, and enter and seize. 14 Car. 2. cap. 11.

Goods conveyed secretly into Ships, and carried away without paying the Subsidy and Duties, the Owners and Proprietors forfeit the double value, except Coals, which only forfeit the double Custom and Duty.

XXIX. There are allowances to be given Merchants for defective and damag'd Goods of 5 *per Cent.* on all Goods imported, and 12 *per Cent.* on all Wines to be allowed upon Debentures; but if they shall ship out less then is in the Certificate, then the Goods therein mentioned, or the value thereof, shall be forfeited, and the Owner or Merchant shall lose the benefit of receiving back any of the Subsidy: and Goods shipped out are not to be landed again in *England* on pain of forfeiture of the Goods.

All Goods coming out of or carried in to *Scotland* by Land shall pass thorough *Berwick* or *Carlisle*, and pay Customs as others, on pain or forfeiture.

And although that by this Act there are many allowances to be made, especially to Merchants Denizons, yet the Parliament have



ever been so careful as to bound the same, that is, shall be to such who Traffick in Ships, (which are indeed the Bulwork of this Isle;) and therefore if such Merchandize shall be Transported out in any Gally or Carrack, they are obliged to pay all manner of Customs, and all manner of Subsidies, as any Alien, but in regard that Herring and Fish are, and have been accounted one of principal Commodities, and generally find a Vent or Market in those Kingdoms and Countries that usually employ such sort of Vessels, those Commodities may be Transported in them as well as Ships from any Port or Harbour within this Realm, without paying any Subsidy or Poundage for the same; but then such Fish must be taken by the Natives of the Kingdom and Transported by them, otherwise to pay as Aliens.

† Per Letters  
Patents bearing  
Date 24.  
Feb. 27 Car. 2.

And whereas all manner of *Woollen Cloaths*, as well white as coloured, unrowed, unbarbed, and unshorne, and not fully dressed, are prohibited by Law† to be Transported; His Majesty was graciously pleased to grant unto *Frances Countess of Portland*, as well for her Alliance in blood, as also for the many Crosses and Calamities which she hath suffered by the loss and Death of her nearest Relations in his Majesty and his Royal Fathers Service, full power for one and thirty years to Licence the Transporting of such goods, *Non obstante* such prohibitory Laws, the which is now put in Execution by agreement and composition with her Deputies at the Customhouse.

## C H A P. XVI.

## Of the Right of Passage : Of Imposing on the Persons and Goods of Strangers for Passage thorough the Seas.

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| <p>I. <i>Of the Right of harmless Utility excepted tacitly in the primitive dominion of things.</i></p> <p>II. <i>Where Passage ought to be open, and where the same might be implicitly provided for in the first institution of Property, and under what Cautions.</i></p> | <p>III. <i>Of the same right as in reference to Goods and Merchandise.</i></p> <p>IV. <i>If Passage admitted, whether Tribute or Toll, may be imposed.</i></p> <p>V. <i>Where Imposition may lawfully be laid, and for what causes : And of the Kings Prerogative in that Point.</i></p> |
|--|--|

I. **H**AVING in the foregoing Three Chapters observed somewhat of *Customs* and *Impositions* laid *de facto* within the Realm, and that by Acts of Parliament, or the consent of the Three Estates, it may not seem amiss to enquire what Imposition the King of his Prerogative may impose on Strangers and their Goods passing thorough his Territories and Seas; and in that to inquire of the same as in reference to Persons and Goods.

Beside the right of necessity, which seems to be excepted in the first Institution of Dominion, there is another Relique of old Communion, namely, the Right of harmless Utility: For why should not one (saith \* *Cicero*) when (without his own detriment he may) communicate to another in those things that are profitable to the Receiver, and to the Giver not chargeable. Therefore *Seneca* † saith it cannot be called a benefit to give leave to another to light his Fire by yours. We read in *Plutarch*, It is not lawful to spoyl our Victuals when we have more then enough, nor to stop nor hide a Fountain when we have drunk our fill, nor to abolish the Way marks either by Sea or Land which have been useful to us: So a River as a River is proper to that *Prince*, or that *Lord*, or that *People*, within whose Dominion or Royalty it runs, and they may make a Mill on it, (unless it be Common as a High-way) and may take what Fish the River yields; but the same River as a running Water remained common as to drinking or drawing of it, notwithstanding as to the Fishing and the like it may be peculiar.

\* *De Offic. 1.*† *De Benef. 4. Sympf. 7.**Leg. quadam D. de rer. divis.*

II. Again, Lands, Rivers, nay if any part of the Sea be come into the Dominion or Property of any People, it ought to be open to those that have need of Passage for just causes, namely, being expelled by force out of their own Country they seek void places, or because they desire Commerce with remote Nations. The reason here is the same which hath been mentioned \* elsewhere, because Dominion might be introduced with a reception of such use † which profits these, and hurts not those, and therefore the Authors of Dominion are to be supposed willing rather to have it so, then that such a restriction which perhaps in the end may destroy Society: however this hath its *quantum*, for though harmless Passage may be excepted in the first Institution of Dominion; yet that is to be understood when leave is granted: and though fear of multitude, which is to pass, cannot take away that Prince his Right thorough whose Territories or Seas they go; yet it follows as natural, that is the Institution of such liberty that Prince or People may provide, and if they have any probable or any reasonable cause to interdict

Bald. 3. conf.  
293.

\* Lib. 1. cap. 1.

† § 6. 4.

Serv. ad. 3. *Æn.*  
*Litisque roge-*  
*mus innocuum,*  
*cujus vindica-*  
*tio, ait, Nulli*  
*possit nocere.*

Plutarch relates,  
That, Cymon,  
going to aid the  
Lacedæmonians,  
led his Army  
thorough Co-

rinth: being reprehended by the Corinthians for not asking leave of the City, *Nam & qui fores alienas pulsas, non intrare nisi domini permisso: at vos; inquit, Cleonæorum & Megarensum fores non pulsastis sed perrexistis, consentes omnia patere debere plus valentibus* However Passage is and must be requested; but in lieu of that, the striking of the Flag, and lowering the Topfail, is in token of that Right due to His Majesty in the British Seas.

their passage till security or Hostages are pledged for their peaceable passage, nay without declaring their reason may interdict them absolutely any manner of passage, if there be any other way pass in safety. And thereof at this day by the Laws of England, the King may interdict any Nation or People whatsoever to pass through his Seas without leave first obtained to that purpose, and may visit all Ships, be they of War or of Traffick, that shall occur or be in the same.

Vide lib. 1.  
chap. 4. Vide  
Mr. Selden's  
Mare Clausum.

† That is by  
the Laws of  
Nature, but  
the Laws of Na-  
tions and those  
of Countries  
may. \* In Legat.  
Caum.

Quomodo autem  
satis digne quis  
explicet facilita-  
tem ad mutua

III. Nor is passage onely due to Persons but to Merchandize also, for no man hath Right † willfully to obstruct the way of Commerce to any Nation with any other that is remote; because the permission of Trade is for the interest of humane Society, and is not discommodious to any one: and to that purpose Philo speaks; \* *On the Sea all Ships of burden safely pass according to that right of Commerce, which is between all Nations arising from the desire of Natural Society, while they supply one another mutually with the one wanteth, and the other can spare; for envy hath never invaded either the whole world, or the greater parts thereof.* And Plutarch speaking thus of the Sea, *This Element hath made our life*

*faciabile and perfect, that otherwise would be wilde and without correspondence; it supplys our wants with mutual aid, and by exchange of things needful it procures fellowship and friendship.* And the wisdom of God is highly to be admired, who hath not granted all things to every Land, but hath distributed his gifts to severall Countries, that men having need of one another might maintain Society for their Common good; therefore hath he endowed Man with knowledge and understanding to invent and build Ships, to govern and guide them by those Lamps of Heaven, and *Dens, ad mundum tanquam domum communiter inhabitantes crebro invicem inviserimus; & apud se nata quisque alteri communiter vicissim, commodè acciperet res apud illum abundantes; ac si exiguum tenens terra partem, ita tanquam si teneret universam, frueretur ejus quæ urbis sunt bonis. Licet itaque; nunc tanquam in communi mensa convivarum unicuique ea quæ sibi appositæ dare alteri longius accumbenti, ac contra quæ apud ipsum sunt accipere manu tantum extentâ.*

other Instruments of his Divine Wisdom, enabling thereby the Merchant to convey to all what any place affords: according to that of the Poet,

*What Nature any Land denied,  
By Navigation is supplied.*

But as the Sea is free and open for Traders, yet nevertheless the Passengers are subject to such Restrictions, Laws and Ordinances as those Sovereign Princes shall make of force in those places where they have an accession of Property or Sovereignty.

IV. But admitting that such free Passage may be granted as above, whether Tribute may be imposed by him that Rules the Land upon Merchandize passing by Land or by River, or by part of the Sea, which may be called an Accession of the Land, (that is, the place thorough which they pass is as much under the absolute Jurisdiction of the Prince, as the very Land it self: ) Certainly whatsoever Burdens have no relation to the Merchandize, no equity suffers the same to be imposed on the same; neither can Poll-money put on the Inhabitants to sustain the Charge of the Commonwealth, be exacted of Passengers.

V. Nevertheless, if either to secure the Passengers Goods and Vessels from Pyrats and others, or for the Erecting of Beacons, Light-Houses, and other Sea-Marks, and such like, \* there indeed some compensation may be laid upon the Commodities or Ships passing thorough, so that the measure of the cause be not exceeded, or as my Lord Coke observes in the case of Halage Money, † it be reasonable; for upon that depends the Justness of Tributes and Toll: And upon those Reasons the Venetian in the Adriatick,

*Commercium nobis datam? No enim interis longitudo impedimentum aliorum ad alios commensatus adferret brevioriam, maris scilicet, ubique terrarum disposuit*

*Vide Strabo. lib. 8. & lib. 16.*

\* 13 H. 4. fol.

14.

† Lib. 5. fol. 63. Case of the Chamberlain of London.

the

*Vide* the Plea of  
the *Venetian*  
Lawyers at the  
end of Mr. *Selden's Mare*  
*Clausum*.  
*Peregr. l. 1. de*  
*jure Fisci*,  
cap. 1. num. 27.

the King of *Denmark* in the *Baltick* Sea, do demand the same: And the King of *England* may do the like in the Chambers of his Empire, and that by his Prerogative; for the same is not so much compulsory to any to pay, but to them that will take benefit of such accommodation.

*Strabo* relates, That the *Corinthians* even from the most ancient of times received Tribute of the Commodities, which (to avoid the Compassing of *Malea*) were carried by Land from Sea to Sea. So the *Romans* received a price for the passage of the *Rhine*. But this Right of imposing on Ships and Goods passing thorough some Territories is found cruel, especially when they must pass thorough the Territories of a powerful and fierce People, then it is heavy to the Merchant to compound, for it's often done on hard and grievous terms.

*The End of the Second Book.*





## CHAP. I.

## Of Freedom, Bondage, Slavery, Exile, and Abjuration.

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|--|--|
| <p>I. Of Freedom by the Law of Nature, and of Bondage, Slavery, or Captivity introduced by the Law of Nations.</p> <p>II. Of the Actions that subject Men to Bondage</p> <p>III. Of the Dominion over Slaves, Bondmen, and Captives.</p> <p>IV. Of the Cause or Reason of such Dominion.</p> <p>V. That this Right or Dominion was not a Law universal.</p> <p>VI. Of Bondage or Slavery, where discontinued by the Christians and Mahometans.</p> | <p>VII. Of a Servitude at this day, standing with the Laws of a Christian Commonwealth</p> <p>VIII. Of Manumission and Freedom by the Hebrew and Roman Law; and by the Laws of England.</p> <p>IX. Of Disfranchising the several ways.</p> <p>X. Of Abjuration and Exile, and what operation it hath.</p> <p>XI. Of Freedom in Cities and Corporations in reference to Merchants, Traders, and Foreigners.</p> |
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I. IN the primitive state of Nature no men were Servants; yet it is not repugnant to natural Justice, that by the Fact of man, that is, by *Covenant or Transgression*, Servitude should come in; therefore Servitude is brought in by the *Laws of Nations*.

II. Hence it is, That those that will yield up their persons, or promise Servitude, are accounted *Slaves*, so likewise all that are taken in *Publick War*, and brought within the Guards of their Conquerors. Nor is transgression necessary, but the Lot of all is equal after the War is begun, even of those whose ill fortune subjected them to be deprehended within the Enemies Bounds; nor are they Servants only themselves, but all their Posterity for ever.

III. The Privileges of this *Right or Dominion* are infinite; since there is no suffering which may not be imposed on such, nor work which may not every way be extorted from them. So that even the Cruelty of Masters became almost unpunished, till the Municipal Laws of Countreys set Bounds to their rigour and power.

*p. ff. de dominiis in servos vita necisque potestatem fuisse Co. Inst. fo. 116. b. B. l. 1. De his qui sui sunt juris institit. de his qui sui.*

Nor are the persons become theirs only that have the power of them, but also all that they have; for such unhappy persons can have nothing of their own.

Hence it was, That that excellent Law in favour of such was introduced

*L. libertus § 1. D. de statu hominum. Item etiam servi liberi homines Captivitate de jure Gentium. Bracton l. 1. cap. 6. Littleton sect. 17 § 1. Postlim. § 1. D. de Captiv.*

*L. & servorum § 1. D. de statu hominum. Apud omnes per aqua gentes, ait Caius, animadvertere*

*Leg. Cornelia ff. de Testam. & Leg. Corneli ff. de vulg. subst.*

*In jure Postliminii Leg. vitor & l. in bello. § 1 & l. bon. ff. de Capt. & § 4. D. quis ius mod. ius patri solvit.*

And Fortescue conceives it began *ab homine* & *pro vita introducta est servitus*. *E. sed libertas a Deo hominis indita natura, quare ipsa ab homini sublata semper redire gliscit, ut facit omne quod libertate naturalis privatur.*

Ca. 42.

\* Artic. of war Anno 1673. for His Majesties Forces Artic. 24.

*Barr. in l. nam. & serv. D. de Reg. gestis.*

In the Wars of the French

produced by the *Romans*, called *Leges Cornelia*; which was when a Captive, *intra praedia hostium*, dyed in his Captivity; if he had made a Will, before his being taken Captive; yet such a Captive should in favour of such Will, and for the upholding of the same, be feigned to be dead; and in *puncto temporis*, immediately before such his being taken Captive; and so by that Legal Fiction of death, his Will became firm and valid, as if he had really dyed without ever being taken by the Enemy. So likewise if one had been made a Slave; yet if he had returned out of his Captivity, that for the preservation of his Right and Propriety, he was feigned as if he had never been absent, and was immediately redintegrated into his pristine Estate and Condition.

IV. Now all these Privileges and Immunities were introduced by the *Laws of Nations*, for no other reason, but that their Captors, tempted by so many Immunities, might willingly abstain from that cruel rigour of slaying their Prisoner.

Hence it is, That the Captors Dominion is extended to the Children; for should such use their highest Right, they would not be born; but before that calamity, and were never taken Prisoners, are freed from that unhappy state.

V. Though this Dominion or Right was generally acquired in most Nations; yet was not the same a *universal Law*; for amongst the *Jews*, refuge was granted to Servants who fell into that calamity by no fault of their own. And the state of *Christendome* at this day is apparent, That Prisoners taken in War, do not become perfect Slaves, as of old; but only remain in the Custody of the Captor, till *Ransoms* are paid, whose valuations are generally at the pleasure of the Conqueror; yet persons of Eminent Quality, as *Generals*, and the like; such, \* if taken by a common Soldier, yet he has no advantage by the same; for such a Captive is become Prisoner immediately to that Prince of State under whom the Captor served: But if it be the Lot of an *Inferior Soldier* to become a Prisoner of War, he is then become absolutely the Captors to dispose of; but he wanting those necessities in the Field for himself, which he ought to provide for his Prisoner, commonly waves that Interest, & generally yields him up a Prisoner of War to be disposed of by that Prince or State under whom he served.

VI. Slavery in *Christendome* is now become obsolete; and in these later ages the minds of Princes and States having as it were universally agreed to esteem the words *Slave*, *Bondman*, or *Villain*, barbarous, and not to be used; and that such as are taken in War between Christian Princes, should not become Servants, nor be sold, or forced to work, or otherwise subjected to such servile things;

things; but remain till an exchange of Prisoners happen, or a Ransom paid, as afore: Nay, the very *Turks* and *Mahometans* at this day generally observe this among themselves, not to make Slaves of those of the *Mahometan Religion*, though taken in War: and that which is most to be admired, a Christian fallen into that miserable state, renouncing his Religion, and becoming a *Mahometan*, immediately upon his Circumcision obtains his Freedom with a Recompence: The Cruelty of those Infidels to those unhappy Persons, together with the reward of renouncing, hath given cause to many a brave Person to become *Renegado*, the which being considered by the Parliament in *England*, they made a \* provision for such miserable Persons as should be taken by *Turkish* and *Moorish* Pyrats. with the *Spaniards* in *Italy*, a Horseman was Ransomed for the 4th of his yearly Pay. *Vide Mariana lib. 27. 18.* And in the last *Belgick* War, the *English* dismiss all the *Flemings* that were taken in War, as they did the like with those of *England* *An. 1671* and 2. *Quamnon sit ardua virtus servitium fugisse manu*, it is none of the hardest Vertues to embrace Death to avoid Slavery. \* 16, 17. *Car. 2. cap. 24.* It's expired; but His Majesty's yet graciously pleased to consider the state of his poor Subjects, and thereupon hath appointed a Committee of the Lords of the Privy Council for the managing of that Affair.

VII. Though *Slavery* and *Bondage* are now become discontinued in most parts of *Christendome*; yet there may be a Servitude which may amount to a labour or suffering equal to that of Captives, the which may be justifiable; for men either through Poverty, and the † like, may oblige themselves by Contract for maintenance to a Servitude that's perpetual, i. e. for life, and so for years; but at this day there is no Contract of the Ancestor can oblige his Posterity to an Hereditary Service; nor can such as accept those Servants, exercise the ancient Right or Dominion over them; no nor so much as to use an extraordinary rigour, without subjecting themselves to the Law: If an Eye or a Tooth had been struck out injuriously, by the *Hebrew Law* Freedom was immediately due; and by the *Greeks*, if Servants had been ill treated, it was lawful for them to demand a *Sale of themselves to others*. At *Rome* the Statues became Sanctuaries for Servants to implore the help of the Governors, against rigour, hunger, or any other intollerable injury inflicted by their Masters; and even in *London* at this day Servitude amongst the many Causes, as not Inrolment of the Indentures, not Instructing in the Art, want of necessaries, *infra etatem* 14, &c. *Vide* the Statute of *Elizabeth* who hath provided the like remedy in other places. Cruelty, Hunger, Rigour, immoderate Correction, and the like, are Causes sufficient on a *Monstrans* or Petition to the Lord Mayor and Aldermen, to dissolve the Contract, though under Hand and Seal, and to Decree all, or part of the Dowry, or some given (if any) to the Servant; and if cruelty hath been in the case, to expose the Master to answer damage to the Party Servant.

*Deut.* 15. 13.  
The *Russians*  
having seized on  
the Countrey  
of *Illiria*, and  
made it their  
own by Con-  
quest, their  
Victory pleased  
them so highly,  
that thereon  
they called  
themselves by  
a new Name,  
*Slave*, which is  
in their Lan-  
guage *Glorious*;  
and not ripened  
(being then their  
*Vide leg.* 12.  
*Tabuli Sigonius*  
*de jure Roman.*  
*l. 1. cap. 10.*  
*\* Justin. Inst.*  
*l. 1. tit. de Inge-*  
*niis vide Franc.*  
*Silo in Catalin.*  
*art. 4.*

*Goodwyn An-*  
*tiq. Rom.* 4.  
33. 34.

*Tertullian de*  
*resur. Carn.*

*Magna Charta*  
*cap. 13.*

\* As to some  
things *Vide*  
*postea.* § 9.

VIII. *Ulpianus* observes after, that by the Laws of Nations Ser-  
vitude came in, then followed the benefit of Manumission. By the  
*Hebrew Law*, after the expiration of the time agreed on the Servant  
was to be manumitted, and that not without Gifts, like *Londons*  
Freedom; by the Custom of which the Master is always at the charge  
of Cloathing and discharging the Chamberlains Fees. By the *Roman Law* every Son was in such subjection to his Father, that before  
he could be released of this subjection, and made Free, he should  
by an Imaginary Sale be sold Three times by his natural Father to  
another man, who was called by the Lawyers *Pater Fiduciarius*;  
that is, a Father in Trust, and then be bought again by his natural  
Father, and so manumitted by him, and then he became Free. This  
form of setting Free was by them called *Emancipatio*, FREEDOM.

but in after time, (that warmer Climate having thawed their Northern hardness,  
their Wits) when they were conquered, the *Italians* in derision calling them  
Bond-men) Slaves. *Sir Walter Rawleigh, lib. 2. cap. 17. § 8.*

That *Roman Darling* was to be obtained Three ways:

1. By Birth, \* both, or at least one of their Parents being Free;  
and such were called *Cræves Originarii*.

2. By Gift and Co-action, when the Freedom was bestowed on  
any Stranger or Nation, and they were termed *Civitate Donati*:  
And so we read, that *Cæsar* took in whole Nations into the Freedom.

Lastly, By *Manumission*, which was thus; when as the Servant  
was presented by his Master before the *Consulor Prætor*, the Mas-  
ter laying his hand upon his Servants head, used this form of words,  
*hunc liberum esse volo*; and with that turning his Servant round,  
and giving him a Cuff on the Ear, he did *emittere servum manu*: The  
*Prætor* laying then a certain Wand, or Rod, called *vindicta*, up-  
on the Servants head, replied in this manner, *Dico cum liberum*  
*esse more Queritur*; then the *Lictor* or *Serjeant* taking the Wand,  
did strike the Servant on the head, and with his hand he struck him  
on the face, and gave him a push on the back and after this he was  
Registred for a *Freeman*: This being performed, the Servant ha-  
ving his head shaven purposely at that time, received a Cap as a To-  
ken of Liberty.

*Tertullian* observes, That at this time of their Manumission the  
Servants received from their Masters a White Garment, a Gold  
Ring, a new Name added to their former.

By the *Laws of England* every Subject Born within the Kings  
Dominions is a *Freeman* of this Realm, as appears by the *Grand*  
*Charter, cap. 14.* yea, though he be a *Bond-Slave* to a Subject.  
\* But a *Stranger* Born is no *Freeman* till the King have made him a  
*Denizen*; in whose Power alone, without the help of any other, one  
may be made Free. To

To be a Freeman of the Realm, the place of Birth is held more considerable than the Quality of the Person: Yet by the opinion of *Hussey Chief Justice*, in 1 R. 3. fo. 4. And in *Calvins Case* of the *Post nati* it is held for Law, That if *Embassadors* of this Realm have Children Born in *France*, or else where; the Father and Mother being Natural Born Subjects, the Children are Free of the Realm of *England*. But if either the Father or the Mother of such children were an *alien*, then are not those children free.

But the Law is conceived to be otherwise at this day. The Statute *de Natis ultra mare* 25. E. 3. cap. declares, the Issue Born of an *English-man*, upon an *English-woman*, shall be a *Denizon*, for upon the Construction of this Statute, it has been adjudged more than once, That if an *English-man* marry a *Forreigner*, and has Issue by her Born beyond Seas, the Issue is a *Natural Born Subject*.

*Bacons Case*,  
1 Cro. 4. fo. 437.  
*Stephens Case*  
2 Car. in the  
Dutchy.

IX. *Disfranchising* by the *Romans*, called *Capiis diminutio*, was three fold, *Maxima*, *Media*, & *Minima*; the least degree was, when the *Censors* pulled a Man from a higher Tribe down to a lower and less Honourable; or when by any *Censure*, they disabled a man from suffraging or giving his Voice in the publick Assemblies; such as were thus in the last manner punished, were termed *Ararii*, and in *ararios veluti, quia omnia alia jura Civium Romanorum praterquam tributi & aru conferendi amiserunt*. *Gellius* relates, That *P. Scipio Nafica*, and *M. Pompilius*, being *Censors* taking a view of the *Roman Knights*, observed one of them to be mounted on a lean starvling Horse, himself being exceeding fat; whereupon they demanded the Reason why his Horse was a lean, himself being so fat? his Answer was, *Quoniam ego, inquit: me curro; stitius meus servus*.

*A Gellius Nost.*  
*Articul. 3. c. 17.*

By the Ancient Laws of *England*, and by the *Great Charter*, no *Freeman* shall be taken or Imprisoned; but by the Lawful Judgement of his Peers (that is, by Jury, Peers for Peers; ordinary Juries for others who are their Peers) or by the Law of the Land; which is always understood by due process of the Law, and not the Law of the Land generally; for otherwise that would comprehend Bond-men, (whom we call Villains) who are excluded by the word *Liber*; for such Bond-men might be Imprisoned at the pleasure of his Lord; but a Free-man neither could, nor can, without a just Cause; nor does the Priviledge extend to private Actions, or Suits between Subject and Subject; but even between the Sovereign and the Subject: Hence it is, that if a Peer of the Realm be Arraigned at the Suit of the King for a Murder, he shall be tried by his \* Peers, that is, by the Nobles. But if he be appealed of Murder upon the prosecution of a Subject, his Tryal shall be by an ordinary Jury of 12 Free-holders; and as the *Grand Charter* did, and does protect the Persons of Free-men; so likewise their

First granted  
17 Job. Reg.  
revived 9 H.  
3. and since  
confirmed  
above 30 times.  
\* The Lord  
Morley and  
Monteagles  
Case; for the  
supposed Mur-  
der of one *Haf-*  
*tings*, 15 Car. 2.  
10 E. 4. 6. 33.  
H. 8. Bro.  
title Tryals.



Free-hold: For by the same *Charter* it is declared, That the King, or His Ministers, shall put no man out of his Free-hold, without reasonable Judgment; and so it was rul'd upon a Petition in Parliament, letting forth, that a Writ under the Privy Seal went to the Guardian of the Great Seal, to cause Lands to be seized into the Kings Hands, and that thereupon a Writ issued to the Escheater, to seize against the form of the *Great Charter*; upon debate of which, the Party had Judgment to be restored: the greatest, and most Explanatory Act, which succeeded in point of Confirmation, was that of *Edward* the 3<sup>d</sup>. the words are, That no man, of what estate or condition soever he be, shall be put out of the Lands and Tenements nor taken or imprisoned, nor disinherited, nor put to death, without he be brought to answer by due Process of Law. that is, by the Common Law.

2. *Diminutio media*, was an Exilement out of the City, without the loss of ones Freedom; the words of the Judgment or Sentence were, *Tibi aque & igni interdicto*.

3. *Diminutio maxima*, was the loss both of the City, and the Freedom, and by his Judgment or Sentence was obliged and limited to one peculiar Countrey; all other places in general being forbidden him.

There was a Fourth kind of Banishment, Disfranchising, called *relegatio*; which was the Exilement only for a reason, as that of *Ovid's*.†

The Laws of *England* in this matter have some resemblance with those of the *Romans*; for *Bracton* observes 4 Distinctions.

1. *Specialis, hoc est interdictio talis Provincia, Civitatis, Burgi, aut Villa.*

2. *Generalis, Interdictio totius Regni, & aliquando est,*

3. *Temporaria, pro duobus, tribus, quatuor, aut pluribus annis, aut, &c.*

4. *Perpetua, pro termino vite, & exilium est aliquando ex arbitrio principis, sicut in exiliando Ducis Hertfordie & Norfolcie, per Regem Richardum Secundum, & aliquando per Judicium Terræ, ut fit in Casu Piers de Gavilton, & etiam in Casu Hugonis de le Spencer Junioris, qui ambo fuerunt exilis per Judicium in Parlamento.* So likewise was that of the Banishment of the Earl of *Clarendon*, who dyed beyond the Seas.\*

X. *Abjuration* was also a legal Exile by the Judgment of the Common Law, as also by the Statute Law; and in the Statute of *West. the second, cap. 35.* He which Ravishes a Ward, and cannot render the Ward unmarried, or the value of her Marriage, must

† Ed. 3. Rot.  
Parl. m. 7.

28 E. 3. Cap. 3.

† Adde quod  
edictum quamvis  
immitte minasq;  
Attamen in  
pena nomine leno  
fuit: Quippe re-  
legatus, non  
exul dicitur in illo.  
Ovid. de Trist.  
li. 2. Elig. In  
London the same  
is done by exhib-  
iting an Informa-  
tion in: he  
saw of the  
common Ser-  
jeant, in the  
Mayors Court  
there, against  
any Citizen that  
shall justly de-  
serve so great  
a dishonour.

\* 17 (Ar. 2.  
cap. 2.

Mr. Sild ob-  
serves, That  
in the time of  
King Henry  
th: First, and  
of other Kings,

must abjure the Realm; and this is a *General Exile*. And by the Statute made 31 *Ed.* 1. Butchers are to be abjured the Town, if they offend the Fourth time in selling measles Flesh; and this is a *Special Banishment*.

both before and after him, that if any man accused of a Capital Crime done at Sea, being publickly called Five times by the Voice of the Cryer, after so many several days assigned; did not make his appearance in the Court of Admiralty, he was Banished out of *England*, & *de mere appartenant au Roy d'Angleterre*, for years more or less, according to his offence. *Mar. Claus. fo. 12.*

A man Exil'd, does forfeit these things.

1. He loseth thereby the Freedom and Liberty of the *Nation* out of which he is Exiled.

2. He forfeits his freedom in the *Burrough* or *City* where he was free; for he which forfeits the Freedom of the whole Realm, forfeits his Freedom in every part.

3. The Law accounts him as one *dead*; for his Heir may enter, and so may his Wife enter into her own Lands, and may sue and Action as a *Feme sole*. 34 E. 1. 1 H. 4.  
Bulstrode. 3.  
part, 188.

4. He shall forfeit those Lands which he shall purchase in the Realm during his *Banishment*, for the during his *Banishment* is as much disabled to purchase as an *Alien*; for *fit alie nigena* by his *Banishment*; and he is observed to be in worse Condition than an *Alien*; for he is marked with *Indignatio principis*. 'Tis true, he cannot forfeit neither Title of Honour, nor Knighthood, nor the Lands he had before *Exile*, unless there be special Sentence or Judgment, as that of the *Spencers*. 15 E. 3. Fitz h.  
Petition pl. 2.

If the Father be in *Exile*, this hinders not the Freedom of the Son; for the same is not a thing descendable; for should it be so, then the *Banishmen* of the Father would make a Forfeiture of the Freedom; but the Son has this Freedom by his own Birth as a Purchase, and not by the death of his Father by descent. Like the Case where *J. S.* hath many Children, and then he confesseth himself a Villain to *J. D.* in Court of *Record*; yet his Children formerly Born are Free-men, and no Villains; the Reason is, because they were Free by their own Births; but the Inheritance is intrahled, because it is to come to the Heir by descent.

XI. A Free-man of a City or Burrough may be made divers ways, as my Lord *Coke* observes.

1. By Service.

2. By Birth, by being the Son of a Free-man.

3. By Purchase or Redemption.

At *Bristol* by Marriage.

8 Rep. fo. 126.  
Case City of  
London.

Sir

Fol. 12.

Sir *John Davies* in his *Irish Reports* observes the same for Law *St. Paul* was born at *Tarsus* in *Cicilia*, which was under the obedience of the *Romans*, by vertue of which he callenged the privilege of a *Roman Citizen*; but is accounted no more than a *National Freedom*: like that of *Calvin*, who claimed the general Freedom of an *English-man*, being born in *Scotland*. But under the obedience of the King of *England*. But that Challenge made not *St. Paul* Free of the Private Customs, Privileges, and Franchises of *Rome*, no more than *Calvins* Birth made him Free Citizen of *London*, to the particular Customs of that City.

King Edward  
the 3<sup>d</sup> granted  
to John Falcount

The King, by his Letters Patents, cannot make one a Free-man of *London*; † yet he may thereby make him a Free-man of his Kingdom.

*de Luca* an Apothecary of the City of *London*, *quod ipse omnibus libertatibus, quas Civis Civitatis predicti habent in eadem Civitate alibi infra Regnum Angli nostrum habeat, gaudet, & utatur*, &c. Rot. Pat. 32 E. 3. in the Tower; yet it was held, That this Grant did not make him Free-man of the City, for it cannot be attained but by one of those ways. † Case of the City of *London*, Co. 8. Reports.

If one be Born in a City, of Parents that are not Free, the Child hereby is no Citizen by Birth, and if one be born of Free Parents out of the place of Privileges, as *London*, &c. he yet is a Free-man by Birth; yet in the Charter Granted to *Yarmouth* the words were, *Concessimus Burgensibus de magna Yarmutha de Villa predicta Oriundis*, that they should have such and such Liberties: So that Special words may alter the Case.

Confirmed by  
*Magna Charta*  
cap. 9.  
Rot. Parl.  
7. R. num. 37.

*London* had many Royal Franchises granted them from time to time, and were often by former Kings successively confirmed; nor wanted they a share when the great Charter was granted, to have their ancient liberties secured, nor were the succeeding Princes slack in their Royal grants and confirmations; but especially *Richard the Second*, who in Parliament granted and confirmed to them all their ancient customes and liberties, with this clause, *Locet usi non fuerint vel abusi fuerint*; and notwithstanding any Statute to the contrary, amongst the number of their many Privileges, the freedom of the same was accounted of no small importance; since in divers Parliaments it was very much aimed at, and endeavoured to be impaired; but at last they obtained a most gracious and Royal Confirmation in Parliament of their ancient liberties, amongst which it is declared that no Merchant, being a Stranger to the Liberty of the said City, should sell any Commodities within the Liberty of the said City to other Merchant-strangers; nor that such Merchant-stranger should buy of any other Merchant-stranger such Mer-

9 E. 2. cap. 2.  
29 . 3. cap. 2.  
27 E. 3. cap. 11.  
7 H. 4. cap. 1.

9 H. 4. this Act  
is not printed.

Merchandise, within the Liberty of the said City, without forfeiture thereof; saving that any Person, Lord, Knight, &c. may buy within the Liberties of any Merchant-Stranger Merchandizes in gross for their own use, so that they do not sell them again to any other. And as this City by Custom may preclude any Person not being free of the same, to sell in such manner upon such pain; so any other City, which are Burroughs or Cities by prescription within this Realm, may have the like Custom, and the goods sold or bought by such, may be subjected to forfeiture, but the same cannot be good by Charter or Grant.

A complete Free-man is such a one as hath challenged his freedom, and taken the Free-mans Oath, and is admitted into the Society and Fellowship of the Freemen, Citizens, and Burgesses; otherwise he hath but a bare right to his freedom.

James Ragg.

Co. 11. R. 7.

## CHAP. II.

## Aliens, as in relation to their Estates Real and Personal.

- |   |   |
|---|---|
| <p>I. Of an Alien his ability and disability in the taking and enjoying of Estates real and personal.</p> <p>II. Of his capacity in purchasing, and disability to transfer by an hereditary descent.</p> <p>III. Of the Rules of descents, according to the Laws of several Countreys.</p> <p>IV. Of descents according to the rules of the Common Law of England lineal and collateral.</p> <p>V. Of Impediments in one that is not medius antecessor.</p> <p>VI. Of Impediments in one that is the medius antecessor lineal and collateral.</p> | <p>VII. Of the Statutes of Natis ultra mare, and of issues born beyond the Seas.</p> <p>VIII. The Lord Coke's opinion, that if an Alien his issue's Sons Deny was, the one purchases Lands and dyes, the other cannot inherit them, advanced and refused.</p> <p>IX. Of Foreign births, which do not create a disability.</p> <p>X. Of Aliens not disabled by Law to bring either real or personal actions.</p> <p>XI. Of Office that must be in the King and Aliens Estates.</p> <p>XII. Of some particular immunities and other matters relating to an Alien.</p> |
|---|---|

**A**N Alien is one born in a strange Countrey, under the obedience of a strange Prince of State, and out of the Ligeance of the King of England, and can have no real or personal action for or concerning Lands; and therefore if he purchase Lands, Tenements, and Hiercements to him and his Heirs, albeit he can have no Heir, yet he is of capacity to take a fee-simple, but not to hold, for the King upon Office found shall have it by his Prerogative.

Calvin's case.

Co. lib. 7.

Taverner 129.

Lord Dyer 253.

So it is if he purchase Lands and dyes, the Law doth cast the freehold and inheritance upon the King.

But if he purchase, or take a Lease for years of a House or Ware-house, which is for the accommodating him as a *Merchant-stranger*, whole Prince or State is in League with ours, there he may hold the same, for that the same is incident to *Commerce*.

And in that case if he departs and relinquishes the Realm, the King shall have the same: for it is, if he be no *Merchant*.

Page 29 Eliz.  
Sir James  
Crofts case by  
the Judges

The like Law is if he takes a Lease of Meadows, Lands, Woods, or Pastures, the King shall have the same, for the Law provides him nothing but a *habitation to trade and traffique in as a Merchant*.

II. Though he may take by purchase by his own *Contract*, that which he cannot retain against the same, for the Law will not enable him by an Act of its own to transfer by hereditary descent (the Alien dying, his issue a *Demizon* born) the Land will not descend, or to take by an *Act in Law*, for the Law (*Qua nihil facit frustra*) will not give him an inheritance or freehold by an Act in Law, for he cannot keep it.

- Therefore the Law will not give him
1. By Descent.
  2. By Courtship.
  3. By Dower.
  4. By Guardianship.

And in respect of that incapacity he resembles a Person *Attaint*, but with this difference.

The Law looks upon a Person *attaint* as one that it takes notice of, and therefore the eldest Son attainted over-living the Father, though he shall not take by descent in respect of his disability, yet he shall hinder the descent to the younger.

32 E. 3.  
Coxing. 5.

But if the eldest Son be an *Alien* the Law takes no notice of him, and therefore as he shall not take by descent, so he shall not impede the descent to the younger Brother. As for instance, if three Brothers, the eldest an Alien, the other two naturalized, and the middle Brother purchase, and dyes without issue, the younger Brother shall have the Lands.

III. Concerning the Rules of descents we are not to govern our selves therein by the general notions of *love or proximity of nature*, but by the municipal Laws of the Countrey the question ariseth; for the various Laws of divers Countreys have variously disposed the manner of descents, even in the same line and degree of proximity: For instance, the Father certainly is as near of kin to the Son, as the Son is to the Father, and is nearer in proximity than a Brother, and therefore shall be preferred as next of kin in administration to the Sons Estate.

Ac.



## Of Aliens.

According to the *Jews*, for want of issue of the Son the Father succeeds, excluding the Brothers, and that hath been the use and construction of the *Jewish Doctors* *innum. 27. 9.* but the Mother was wholly excluded. 3 Report Res. liti Case. Seldeni de successiōibus apud Hebraeos, c. 20.

2. According to the provision of the *Greeks* for the succession or exclusion of the Father, is left doubtful.

3. By the *Roman Civil Law*, according to the estimation of the *twelve Tables*, the Father succeeded in the purchase of the Son for want of issue of the Son, under the title *proximus agnatus*, and so was the use; but my Lord *Coke* supposes the contrary.

But taking the whole Institution of *Fustian*, the Son dying without issue, his Brothers, Sisters, Father or Mother do succeed him as well to Lands as Goods, in a kind of *Coparcenary*. Comment. on Littleton fo. 5. 63. tit. 2. 3. tit. 1. de hereditibus ab intestato venientibus. Customs Normand. c. de scheargers.

4. According to the *Laws of Normandy*, (which in some things have a cognition with our Law) his Brothers are preferred before the Father (if the Son dye issueless,) but his Father before his Uncle.

5. According to the *Laws of England* the Son dying without issue or Brothers, or Sisters, the Father cannot succeed but it descends to the Uncle.

IV. There be two kinds of descents according to the Common Laws of this Realm:

1. *Lineal*, from the Father or Grand-father to Son or Grand-son.

2. *Collateral or transversed*, as from Brother to Sister, Uncle to Nephew, and *conversa*: And both these again of two sorts.

2. *Immediate*, as in lineals from Father to Son.

1. *Mediate*, as in lineals from Grand-father to Grand-child, where the Father dying in the life time of the Grand-father, is the *medium differens* of the descent. *Collateral* as in lineal from Uncle to Nephew, or *conversa*. Grotius de Jure belli ac Pacis, lib. 2. c. 7.

And this mediate descent, or mediate Ancestor, though so many purposes it be immediate; for the Father dying in the life of the Grand-father, the Son succeeds in point of descent in the Lands immediately to the Grand-father; and in a writ of *Entry* shall be supposed to be in by the Grand-father, and not in the *post mortem*.

This is called a mediate descent, because the Father is the *medium* through whom the Son derives his title to the Grand-father.

In immediate descents there can be no impediment, but what arises in the parties themselves: For instance, the Father seized of Lands, Impediment that hinders the descent must be in the Father or Son, as if either of them attaint, or an Alien.

In mediate descents, a disability of being an Alien or Attaint, in him that is called the *medius antecessor*, will disable a Person to take by descent, though he himself have no such disability.

In lineal descents, if the Father be Attaint or an Alien, and hath issue a *Denizon* born, and dye in the life time of the Grand-father dyes seized, the Son shall not take, but the Land shall *escheat*.

In Collateral descents A. and B. brothers; A. is an Alien or attaint, his issue C. and Denizon born, B. purchases Lands and dyes without issue C. shall not inherit, because A. which was the *medius antecessor* or *medius differens* is incapable.

V. But in descents, the impediment in an Ancestor, that is not *medius antecessor*, from whom and to whom will not impede the descent.

As for instance, the Grand-father and Grand-mother both Aliens, or attaint of Treason, have issue, the Father *Denizon*, who hath issue the Son a *natural born Subject*, the Father purchases Lands and dyes, the Son shall be Heir to the Father, notwithstanding the disability of the Grand-father, (and yet all the blood which the Father hath is derived from his disabled Parents) for they are not *medius antecessores*, between the Father and the Son, but paramount.

The Law does not hinder, but that an *Alien* is of the same degree and relation of consanguinity, as *natural born Subjects* or *Denizens* born, the Father and Brother though Aliens; the Son, Father and Brother our Law takes notice of as well as *natural born Subjects*: and so it was adjudged, for he shall be preferred in Administration though an Alien, as next of Kin.

But in cases of *Inheritance* the Law takes not notice of him, and therefore as he shall not take by descent, so he shall not impede the descent to the younger Brother; As for instance A. an Alien B. and C. naturalized by Act of Parliament, (brothers) B. purchases Lands and dyes *sine prole*, C. shall inherit, and not A.

A. an Alien, B. and C. his Brothers both naturalized by Act of Parliament, B. purchases Lands and dyes without issue, the same not come to A, nor to his issue though *Denizens*, but shall come to C. and his issue; the Law taking no notice of A. as to impede the succession of C, or his issue, though it work a *consequential disability* to bar the issue of A. parallel to what the Law the Law calls *corruption of blood*, which is a consequent of Attainder.

VI. Again in lineal descents, if there be a Grand-father natural born Subject, Father an Alien, Son natural born Subject, the Father is made *Denizon*, he shall not inherit the Grand-father; and

Dyer 274.  
Gray.

Courtney 1.  
Com. Pleas.  
Caton 30.

Michalsmas.  
3 Car. Cro. 4.  
part, Carsons.

32 Ed. 3. tit.  
Cozenage 5.  
Ramsey 6.  
15 Car. 2. in  
Com. Banc.

and if the Father dyes in the life of the Grand-father, the Grand-child, *though born after the denization*, doth not remove neither the personal nor consequential impediments or incapacity of the Father. In *collateral descents*, the Father a natural born Subject has issue two Sons Aliens, who are both made Denizens, and dyes without issue, the other shall not inherit him.

¶ *A.* an Alien marries an English woman, who is seized of Lands and has issue, the Father and Mother dyes, yet the issue may inherit the Mother, *non obstante* the incapacity of the Father being an Alien.

¶ VII. The Statute *de Natis ultra Mare*, declares the issue born of an English-man upon an English-woman shall be a Denizon; yet the construction has been, though an English Merchant marry a Foreigner, and has issue by her born beyond the Seas, *that issue is a natural born Subject*.

But if an English woman go beyond the Sea, and there marry an Alien, and have issue born beyond the Sea, that issue are Aliens.

If an English woman marries an Alien Beyond the Seas, and then comes into England and has issue, they are not Aliens, but may inherit.

My Lord Coke in his *Commentaries on Littleton* seems to be of opinion, that if an Alien has issue two Sons born in England; one dying without issue, the other shall not inherit him. But the Law is otherwise taken at this day, as I conceive the reasons that have been given are,

¶ I. Though the descent from one Brother to another Brother be a *collateral descent*, yet it is an *immediate descent*; and consequently if no disability or impediment can be found on them, no impediment in another Ancestor will hinder the descent between them.

That this is an immediate descent appears.

First, In point of pleading, one Brother shall derive himself as Heir to another without mentioning any other Ancestor.

Secondly, According to the computation of degrees Brother and Brother make but one degree, and the Brother is distant from his Brother or Sister in the *first degree* of consanguinity and no more; by the Laws of England.

According to the *Civil Law* \* Brother and Brother make but one degree, for the Brother is in the *second degree* from the Brother, yet both make but one degree.

According to the *Canon Law* † *Frater & Frater*; or *Frater & Soror*, *sunt in primo gradu*.

And therefore the Laws prohibiting marriage between Kindred

Godfry and  
Dixons case.

Hill 16 Jac. in  
B. R. Godhols.

275

*De Natis ultra  
mare* 25 Ed. 3.  
2 Car. in the  
Duchy of  
Stephens case.

16 Car. 1 Cr.  
437. Bacon's case,  
Provokes case  
of Kent.

*Com. lib. fo. 8f.*

For L. C. 1. Halo  
in Ramsfords case.

\* Just. l. 9. tit.  
de gradibus con-  
sanguinitatis 28.  
† Decret. Gra-  
tiani cap. 35.  
quest. 5.

in the *fourth degree*, take Brothers and Sister to be the *first degree* of the four.

The Laws of *England* in computation of the degrees of consanguinity agree with the *Canon Law*, and reckon the Brother and Sister to be the *first degree*.

Herewith agree the Customs of *Normandy* \* which though in some cases differ from the Laws of *England*, yet herein and in divers other particulars touching descents they agree.

Another evidence to prove that the descent between Brothers is immediate is this, (*viz.*) the descent between Brothers differ from all other collateral descents whatsoever; for in other descents collateral the half blood does inherit, but in a descent between Brothers the half blood does impede the descent, which argues that the descent is immediate.

The Uncle of the part of the Father has no more of the blood of the Mother, than the Brother by the second *venter*; the brother by the second *venter* has the immediate blood of the Father with the Uncle, (*viz.* the Father's Brother) has not but only as they meet in the Grand Father; the Brother of the half blood is nearer of blood than the Uncle, and therefore shall be preferred in *Admission*.

It is apparent that if in the line between Brother and Brother the Law takes notice how the Father was the *medium* thereof, the Brother of the second *venter* should rather succeed the other Brother, because he is Heir to the Father, therefore in a descent between Brothers the Law respects only the *immediacy relation of the Brothers as Brothers*, and not in respect of the Father, though it is true, the foundation of their consanguinity in their Father or Mother.

Again, if the Father, in case of a descent between Brothers, were such an Ancestor as the Law look'd upon as the *medium* that derives the descent from the one Brother to the other, then the Attainder of the Father would hinder the descent between the Brothers: But the Attainder of the Father does not hinder the descent between the Brothers, the reason is, because the Father is not such a *medium* or *nexus* that is look'd upon by the Law, as the means deriving such a descent between the two Brothers: As for instance of three cases, two whereof evince the first proposition, (*viz.*)

That although the descent from one Brother to another Brother, though in be a Collateral descent, and that if no disability or impediment arises in them, no impediment in another Ancestor will hinder them.

The

Litt. sec. 20  
31. Ed. 3. *Card.*  
116. *Hollands*  
cause cited by  
*Lisleton*.

\* *Sarrien* in  
Comptes, de-  
grees in Line  
Collat. *Salic*,  
etc. *Browns*  
case *Mit.* 1656.  
*B.R. Costra* 5. E.  
6. 1ro. *Admi-*  
stration 47 which  
prefers the Bro-  
ther of the half  
blood before  
the Mother.

The younger Brother has issue, and is attained of Treason and dies, the elder Brother has title to a *Reversion of Right*, dies *sans issue* without a restitution, the younger brothers son has lost that title; for though the title were in the Ancestor that was not attained, yet his Father (that is the *medium* whereby he must convey that title) was attained, and so the descent was obstructed.

*Henry Courtney* had issue *Edward*, and was attained of Treason and died, *Edward* purchased Lands and died without issue, the Sisters and Heirs of *Henry* were disabled to inherit *Edward*; yet neither *Edward* nor his Aunts were attained, or their Blood corrupted: yet because *Henry* was the *medium* through whom the Aunts must derive their pedigree and consanguinity to *Edward*, who was attained, the descent was obstructed till a restitution in blood.

But if the Grand-Father of *Edward* had been attained, and not *Henry*, this would not have hindered the descent from *Edward* to the Aunts, because that *Attainder* had been *paramount* to that consanguinity which was between *Henry* and his Sister, and that is proved by this third case.

*William Hobbs* had issue *Philip* and *Mary*, and was attained of Treason and died, *Philip* purchases Lands, and dyed without issue; it was adjudged in that case, that *non obstante* the Attainder of *William Hobbs*, *Mary* should inherit, because the descent and pedigree between *Philip* and *Mary* was immediate, and the Law regards not the disability of the Father.

If the Heir of the part of the Father be attained, the Land shall escheat, and shall never descend to the Heir of the part of the Mother; but if the Son purchase Lands, and has no kindred of the part of the Father but an Alien, it shall descend to the Heirs of the part of the Mother.

IX. Those that are born *sub fide, legumina, obedientia Domini Regis* and therefore those that were born in *Castrope, Normandy, Aquitaine, Arman, Calice, Spain*, whilst they were under the Dominion of the Kings of *England*, were natural born Subjects, and not Aliens.

Scotland is Kingdom by union, and therefore those that were born in *Scotland* under the allegiance of the King, as of his Kingdom of *Scotland*, before the Crown came united, were Aliens born, and such plea against such Persons was a good plea; but those that were born since the Crown of *England* descended to King *James* are not Aliens, for they were *sub fide legumina Domini Regis*, to those that are born at this day in *Virginia, New England, Barbadoes, Jamaica*, or any other of his Majesty's Plantations and

10. *Elizabeth, Lyr*  
27. *Grays case*  
1706. *Grays*  
1710. *Grays*  
1712. *Grays*

Com. placit. Co.  
ron. f. 241.  
*Henry Court*  
1731. *case*

*Mich. 40. 41.*  
*Elizabeth*, ruled in  
the Exchequer  
in the case of  
*Hobbs*, 1731.  
1732. *case*  
1733. *case*  
49. E. 3. 12.  
or *Tank* and  
*Leshay*

Co 7 Rep. 23.  
*Calvinus cases*



*Sir John Bar-*  
*roughs* Sovere-  
ignty of the  
Seas fol. 102.

and Dominions, are natural born Subjects, and not Aliens, so likewise those that are born upon the King of England's Seas are not Aliens.

X. But if an Alien be made an Abbot, Prior, Bishop, or Dean, by the plea of an Alien we shall not disable him to bring any real or mixt action concerning the possessions that he holds in his pollicick capacity, *because the same is brought in aucter droit.*

The like Law is for an Executor or Administrator, because the recovery is to anothers use.

*Pafes* 31 *Eliz.*  
C. B.

*Mich.* 6 *Jac.* in  
C. B. *Brownlow*  
I *part.* 45.

If an action is brought against an Alien, and there is a Verdict and Judgment against him; yet he may bring a writ of Error and be Plaintiff there, and that such plea is not good in that case.

*Mich.* 29 *Eliz.*

in C. B. *Gold*  
*folio* 29. *Mich.*  
30 *Eliz.* *Coke* 5.  
*part* *Paper* *case*  
*fol.* 52. *Moore*

Though an Alien may purchase and take that which be cannot keep nor retain, yet the Law hath provided a mean of enquiry before he can be devested of the same, for until Office be found the free hold is in him.

431. *Walton* v.  
*Masburn Dyer*  
232. *Alien.*

*Stamford* *Prero-*  
*gative Regis* f.  
18. *fol.* 53. *tit.*  
*Kinns* *sciz.* in.  
*W. C.* *Croft* v. e.  
*Gayr* *Croft* 3. *part*  
*fol.* 123.

And this Office, which is to gain to the King a Fee or Freehold, must be under the *Great Seal of England*, for a Commission under the *Exchequer Seal* is not sufficient to entitle the King to the Lands of an Alien born; for the Commission is that which gives a title to the King, for before that the King hath no title: but in cases of *Treason* there upon Attainder, the Lands are in the King without Office; and in that case, to inform the Court, a Commission may go out under the *Exchequer Seal*.

*Plowd.* *Cem.*  
477.

XI. If an Alien, and a Subject born, purchase Lands to them, and to their Heirs, they are *joint tenants*, and shall join in Assize, and the Survivor shall hold place till Office found.

17 *E.* 3. *fol.* 10.  
*Henry Hills*  
*case.*

By the finding of this Office the party is out of possession, if the same be of Houles or Lands, or such things as do lye in livery; but of Rents, Common Advowsons, and other Inheritances incorporeal with lye in grant, the Alien is not out of possession (be they appendant or in gross) therefore if an Information or an Action be brought for the same, the party may traverse the Office for the King.

29 *Assize* 30.  
21. 32. *Assize*  
*Fravers* 32.  
*Stamford* *pls.*  
1. 54. *cap.* 8. 1.

And if the King obtains not the possession within the year after the Office found, he cannot seize there without a *Seire facias*.

23 *Car.* in 2. *R.*  
*styles* 20. *King*  
*vers.* *Holland.*

It is not for the Honour of the King (an Alien purchasing of a Copyhold) to seize the same, for that the same is a base tenure; and so it was adjudged where a Copyhold was surrendered to J. S. in trust that one *Holland* an Alien, should take the profits thereof to his own use and benefit, upon an Inquisition taken, it was adjudged the same was void and should be quashed, because the King cannot be intitled

itled to the Copyhold Lands of an Alien, nor to the use of Copyhold Lands as the principal case was.

An Alien Infant under the Age of 21 years cannot be a Merchant Trader within this Realm, nor can he enter any Goods in his own Name at the Customhouse.

Stat. 14 Car. 2.  
cap. 11.

If an Englishman shall go beyond the Seas, and shall there become a sworn Subject to any Foreign Prince or State, he shall be look'd upon in the nature of an Alien, and shall pay such Impositions as Aliens; if he comes and lives in England again, he shall be restored to his Liberties.

14, 15 H. 8.  
cap.  
Hill. 12 Jac.  
Eulfr. 3 part  
f. 19. cited in  
Sir Tho. Walters  
case. Yelv. 199.

An Alien is robbed, and then he makes his Executor and dies, and afterwards the goods are waif, the Lord of the Franchise shall not have them, but the Executors *Vide Stat. 13 E. 4.*

Turton, verj.  
Monson, 8 Jac.  
B.R. Moore 481.  
But yet Aliens  
and Denizens  
are restrained by  
the Stat. of 5

All Personal Actions he may sue, as on a Bond, so likewise for the Common Law according to the Laws of Nations protects Trade and Traffick, and not to have benefit of the Law in such cases is to deny Trade.

Eli2. to use any  
the Statute what  
Huttons Reports

Trade, not having served seven years as Apprentices within the Realm. *Vide the Statute what Trades (Trin. 12. Car. 1.)* at Serjeants Inn in Fleetstreet by all the Judges.

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## CHAP. III.

## Of Naturalization and Denization.

- I. *Whether the Kings of England can naturalize without Act of Parliament.*
- II. *What operation Naturalization hath as in reference to remove the disability arising from themselves.*
- III. *What operation naturalization hath as in reference to remove defects arising from a lineal or collateral Ancestor.*
- IV. *A Kingdom Conquered, and united to the Crown of England, whether by granting them a power to make Laws, can implicitly create in them such a Sovereignty, as to impose on the Realm of England.*
- V. *Of Persons naturalized by a Kingdom dependent, whether capable of imposing on one that is absolute.*
- VI. *Of Kingdoms obtained by conquest, how the Empire of the same is acquired, and how the Conqueror succeeds.*
- VII. *Ireland, what condition it was accounted before the Conquest, as in reference to the Natives of the same, and whether by making it a Kingdom they can create a Foreigner as a natural born subject of England.*
- VIII. *Of aliens, as in reference to the transmission of their Goods & Chattels by the Laws of France.*
- IX. *Of the Privileges the Kings of England of old claimed, in the Estates of Jews dying commorant here, and how the same as this day stands.*
- X. *Of Persons born in places annexed or claimed by the Crown of England how esteemed by the Laws of the same.*
- VI. *Of Denization, and what operation it hath according to the Laws of England.*
- XII. *Where an Alien is capable of Dower by the Laws of England, and where not, and of the total incapacity of a Jew.*
- XIII. *Whether a Denizen is capable of the creation and retention of Honour, by the Laws of England.*

**T**He Father and the Mother are the fountain of the blood natural, and as it is that which makes their Issue Sons or Daughters, so it is that which makes them Brothers and Sisters; but it is the civil qualifications of the blood that makes them inheritable one to the other, and capable of enjoying the immunities and privileges of the Kingdom; but that is from another fountain, viz. the Law of the Land, which finding them legitimate, doth transplant them into the Civil right of the Land, by an Act called Naturalization; which does superinduce and cloath that natural consanguinity with a civil hereditary quality, whereby they are enabled not only to inherit each other, but also to enjoy all the immunities and privileges that meer natural born subjects may or can challenge.

II. According to the Laws of Normandy the Prince might naturalize; but such naturalization could not divest the descent already vested.

But

But according to our Law by no way but by *Act of Parliament*, and that cures the defect as if they had been born in *England*, and no man shall be received against an *Act of Parliament* to say the contrary.

Therefore if the Father an *Alien* has issue a *Son* born *here*, and then the *Son* is naturalized, the *Son* shall inherit.

If the Father a *natural born Subject* issue an *Alien* who is *naturalized*, the Father dyes, the *Son* shall inherit. Conc. Lit. 129.

III. *Naturalization* does remove all that *disability* and *incapacity* which is in *Aliens* in respect of themselves, and so puts them entirely in the condition as if they had been *born in England*.

The *Relative* terms, as if born in *England*, is generally used to supply the *personal defect* of the parties naturalized, arising from their *birth out of England*; and therefore shall never be carried to a *collateral* purpose, nor cures a disease of another nature, as *half blood illegitimation*, and the like; but all diseases, whether in the parties themselves, or *resulting* from the *Ancestor*, it cures.

*Acts of Parliament* of this nature may be so pen'd, as to cure defects in the *Father* or *Ancestor*, or in the parties *themselves*.

If *restitution* in blood be granted to the *Son* by *Act of Parliament*, this cures that *disability* that resulted from the *Father's Attainder*, and that not only to the *Son*, but also to the *collateral Heirs* of the *Father*; the true reason of this is, because *the corruption of the blood by the Attainder is only of the blood of the Father, for the Sons blood or collateral Heir was not at all corrupted*; for the scope of the *Act* in *taking* notice of the *Father's Attainder* does *intentionally* provide against, and remove it, for otherwise the same had been useless. Coke 3. Inst. fol. 124.

But in *naturalization* without express words, it takes no notice of the defects in the *Father* or other *Ancestor*, nor removes them.

And therefore such *Acts of Parliament* as take no other notice but of the *Person naturalized's Foreign birth*, the same cures not any *disability of transmission hereditary* between the *Father*, *Brother*, or any other *Ancestor*, *resulting* from the *disability* of them without *actually naming of them*. As for instance, the *Father* an *Alien*, the *Son* naturalized by *Act of Parliament*, the *Father* or any other *Ancestor* an *Alien* purchases *Lands* and dyes, the *Son* shall not take by reason of the *disability* in the *Fathers*, but there may be words inserted in the *Act* that may take away the impediment.

V. They that are born in *Ireland*, and that are born in *Scotland* are all alike, for their birth are within the *Kings Dominions*, and

they are born under the like subjection and obedience to the King, and have the like bond of *allegiance ad fidem Regis*; yet if a Spaniard comes into Ireland, and by the Parliament is there naturalized, though perhaps this may qualify and cloath him with the title of a natural born Subject of Ireland, yet it has been conceived that it will not make him a natural born Subject of England.

For the union of Ireland to that of England is different from that of Scotland; for the first is dependent, as a Kingdom conquered, the later independent; Though Henry the II. after his Conquest of that Nation, did remit over from England the Ancient *modus tenendi Parliamentum*, enabling them to hold Parliaments, which after was confirmed by King John; yet that was by no other force then bare Letters Patents. Now when a Nation is once conquered there remains no Law but that of the Conqueror; and though he may incorporate such conquered Nations with his own, and grant unto them their ancient Parliamentary wayes of making of Laws; yet the Conqueror can no ways grant unto them a power by vertue of such Grant or Confirmation, as to impose upon his own Country, for he himself before such Conquest could not make a natural born Subject without Act of Parliament, and certainly his Conquest adds nothing to his power, though it doth increase his Dominion.

V. Again, Kingdoms that are absolute under one Prince; *ad fidem Regis*, there the Acts of each other are reciprocate, and one naturalized by the Parliament of Scotland, is as naturalized in England, because Scotland is a Kingdom absolute; but Ireland is a Kingdom dependent and subordinate to the Parliament of England, for the Parliament in England can make an Act to bind, Ireland, but not *e converso*. Now to be a Native of Ireland is the same as to be born in Ireland, and to be the same as to be born in England, must be by the Laws of England: But there is no Law that hath enabled them with such a power as to naturalize further then their own Laws extend; but the Law of Ireland does not extend in England, therefore Naturalization in Ireland, operates only in Ireland because of the failure of power.

V.I. Again, Kingdoms that are Conquered the Empire of the same may be acquired by the Conqueror, only as it is in a King, or other Governour, and then the Conqueror only succeeds, in to his right, and no further\*: or also as 'tis in the People, in which case the Conqueror hath Empire, so as that he may dispose of it, or alienate it as the People themselves might; for 'tis one thing

My Lord Coke  
so conceives but  
Mr. Selden de-  
nyes that ever  
there was any  
such *modus te-  
nendi* but the  
same is an im-  
position. Vide his  
Titles of Hon-  
our, fol. 708. 710  
718. to 721.

Selden, Tit. of  
Honour fol. 213.  
in Scotland, the  
tit. is Carolus Sco-  
tia, Anglia, Fran-  
cia, & Hybernia  
Rex; but in Ire-  
land, Anglia;  
Scotia.

\*From hence it  
is that the King  
at this day can-  
not alien or sell  
Ireland without  
an Act of Parlia-  
ment, for they



to inquire of the thing, another of the manner of holding of it, the which are applicable not only to corporal things, but incorporeal also. For as a Field is a thing possessed, so is a passage, an Act, a way; but these things some hold by a full right of Property, others by a right of usufructuary, others by a temporary right. Again, by the will of the Conqueror the Kingdom or Republick that is so conquered may cease to be a Kingdom, or Common-wealth, either so that it may be an Accession of another Kingdom or Common-wealth, as the Roman Provinces, or that it may no ways adhere to any Kingdom or Common-wealth; as if a King waging War at his own charge, so conquer and subject a People to himself, that he will have them governed, not for the profit of the People chiefly, but of the Governour, which is a property of what we call Heril Empire, not of Civil; for Government is either for the profit of the Governour, or for the utility of the Governed, this hath place among Free-men, that among Masters and Servants. The People then that are kept under such command will be always for the future not a Common-wealth, but a great Family; hence it is that we may plainly understand what kind of Empire is that which is mixt of Civil and Heril, that is, where Servitude is mixt and mingled with some personal Liberty: For if the People are deprived of Arms, commanded to have no Iron, for Agriculture, to change their language, and course of life, and abstain from the use of many of their Customs, to be confined † to their own Houses, Castles, or Plantations, not wander abroad, to be governed by such Laws as the Conqueror should transmit to them \*, all which are the tokens of a Nation by conquest made subordinate to the Conqueror, and are part Heril, and part Civil, and though they may remain a Kingdom, and absolute within themselves as to the making of Laws, to the obliging each other, yet they can no ways impose on their Conqueror, for though that be true which in *Quintilian* is alledged on the behalf of the *Thebanes*, that, that only is the Conquerors which he holds himself, but an Incorporeal right cannot be holden, and the condition of an Heir and of a Conqueror is different, because the right passeth to the former by the descent, but only the thing by the last by virtue of the Conquest. But certainly that is no objection, for he that is master of the persons, is also master of the things, and of all right that does belong to the Persons, for he that possessed, doth not possess for himself, nor hath he any thing in his power who hath not himself; and so it is if he leaves the right of a Kingdom to a conquered People, he may take to himself some things which were the

whose right succeeds could not do it. Co. 4. *Instaur.* fol. 357. nor can he grant *Portus Maris obedientibus*, *advocationibus*, & *patronationibus Ecclesiarum Metropolitanarum*, & *Cathedralium Cancellar.* *Justic.* nor *mero* & *mixto Imperio*, and many more, all which are inseparably annexed to a Kingdom. † *Imperium aliud est ob utilitatem ejus qui regitur, hoc inter liberos locum habet, illud inter Dominos & servos.* *Arist.* 17. de *Republica*. † Case of e. Earl of Shrewsbury on the Stat. of 28 H. 8. of Absentee, 4. *Inst.* prescribes fol. 354. \* Or else they came to London for them, Cl. 18 Hen. 3. m. 17. *Ariovistus apud Casarem, jussu belli ait, ut qui vicissim iis quos vicissent quemadmodum vellent imperarent, de Bello Gall. lib. 1. Leg. qui in servitute est de reg. Juris Lex servorum D. ad leg. Jud. de Adult.*

Kingdoms, for it is at his pleasure to appoint what measure he will to his own favour; from hence it is we may observe what sort of Empire that Kingdom is at this day.

VII. Now *Ireland* before the same became united to the Crown by the Conquest of *Henry* the II. the natives were meer Aliens, and out of the protection of the Laws of this Realm; yet when once they became a conquered People, and subject to the Crown of *England*, and united *ad fidem Regis* there did arise their allegiance but that union neither made them capable of the Laws of *England*, nor of their own, till such time as the Conqueror had so declared them; now what do they desire in order to revive their Government? First, they humbly beg of King *Henry* II. that since he was pleased that they should remain as a distinct Dominion, that their ancient Customs, or Usages should not continue; that he would be pleased to ordain; that such Laws as he had in *England* should be of force and observed in *Ireland*; pursuant to which he grants them power to hold Assemblies by the three Estates of the Realm, and that they should be regulated according to the institution, and manner of the Parliaments in *England*, should have the benefit of *Magna Charta* and other the great Laws of *England*, and by such means puts them into a method of Governing themselves, according to the known Laws of *England*, and to make such Laws as should bind among themselves; and by following the example of those of *England*, their Judgment might be supervised, and corrected according to the Justice and Laws of *England*, by Writs of Error, Appeal, and the like.

Now here is no continuing or reviving their Ancient Government, but to the introducing a new one, part Civil, and part Heril; nor indeed had they before any such thing as a Parliament there, or general Assembly of the three Estates; for when *Henry* the II. went over; there were several Kings or Scepts, who had their several and distinct Assemblies; but when they submitted, this great Assembly of Estates which he constituted, was collection out of all of them, for their future well Government; so that whatsoever *modus* of Regiment the Conqueror declared; it was no more then for the well Governing of the Place; and making such Laws as were necessary and proper amongst themselves: But for them to impose, by vertue of an Act of Naturalization, upon an absolute Kingdom as *England*, without the consent of the three Estates of the same, surely was never intended, much less effected, the case is both great and curious therefore, &c.

VIII. By the Laws of *France* all persons not born under ligeance

Calvins case lib  
fol. 23.

For a general  
Council at Cas-  
sels of all the  
Clergy there,  
Anno 1170. Ec-  
clesiastical Laws  
of *England* were  
established and  
made of force in  
*Ireland*, *Geraldus*  
*Cambrensis* *Topo-*  
*graphia Hyber-*  
*nia*, l. 3. cap. 18.  
Pas. 3. E. m. 13.  
*Hyber. Matthew*  
*Paris Hist. Ang.*  
p. 121. *legis An-*  
*glia ab omnibus*  
*juris gratiam*  
*precepta.*  
\* *Oruckys case* 13  
*Eliz. Colk. 7. part*  
*fol. 23. Calvins*  
*case. Rep. Placita*  
*Parliament p.*  
198. to 199.

Sir John Davys  
on the Conquest  
of *Ireland* 103.  
104. 105.

of that King are accounted Aliens, and if they dye the King is entitled to the estate, for all shall be seized into his *Exchequer* or *Finances*; but if they make a Will the prerogative is disappointed: Yet that extends only to Chattels personal: in which Strangers passing through the same have greater immunities then Aliens there resident, for travellers dying without Will, the Heirs or Executors shall have benefit and possession of their Estates.

IX. The like Priviledge the Kings of *England* formerly claimed in the Goods and Estates of the *Jews* after their death if the Heir sued not, and paid a fine to the King to enjoy them, as by this Record appears.

*Juratores super sacrum suum, dicunt, quod pradiatum messuagium fuit quondam Eliz le Bland, qui, &c. diem clausit extremum; & quia mos est Judaismi, quod Dominus Rex omnia bona & catalla Judei mortui de jure dare poterit cui voluerit, nisi propinquior heres ejusdem Judei finem fecerit pro eisdem; dicunt quod Dominus Rex dictum messuagium dare poterit cui voluerit, sine injuria alicui facienda; si ita sit quod heres dicti Eliz finem non fecerit pro Catallis ejusdem Eliz habendis, &c.*

*Escheat* 52.  
*Anno 31 H. 3.*  
*num.*

But whether the same is now used may seem doubtful, for the goods of Aliens escheat not at this day to the Crown, but Administration shall be committed to the next of kin.

*Caroones case.*  
*Hibboys case.*  
*Stephens case.*

X. By the Laws of *France*, *Flanders*, *Milan*, and the *French County of Savoy*, though possessed by several other Princes, yet the Natives of the same partake in the immunities with the natural born Subjects of *France*; and if they dye without Will, their Heirs claim their Estates; the reason given, because, say they, those Countreys were never alienated from them, but were always annexed to the the Crown of *France*, who acknowledges them to be their Subjects to this day.

But in *England* it is otherwise, for those other that are born in *Gascain*, *Normandy*, *Aquitain*, and those other Territories which were formerly the possessions of the Crown of *England*, in which if any had been born when subject to the same, they would have been natural born Subjects, yet now are esteemed Aliens. And so was the Case vouched by *Schard* of a *Norman*, who had robbed together with others *English*, divers of His Majesties Subjects in the *Narrow Seas*, being taken and arraigned, the *Norman* was found guilty onely of Felony, and the rest of Treason, for that *Normandy* being lost by King *John* was out of the Allegiance of *Ed. 3.* and the *Norman* was accounted as an Alien.

Note, this was before the Stat. of 25. E. 3. its vouched by *Shard* in 40 Assize pl. 24. See *Calvins case* Rep.

XI. In *France* the Kings may there Denizize, so likewise here in

in *England*; but with this difference, the Letters of Denization by thole of *France* remove the total disability and incapacity of the Alien.

But in *England* the Charter of Donation or Denization is but a temporary, partial, and imperfect Amotion of the disability of an Alien; for though it puts no person indenizon'd as to some purposes in the condition of a Subject, and enables a *transmission* hereditary to his Children, born after the Denization, yet does not wholly remove the Disease or *Nonability* as to the points of *descent* or *hereditary transmission*, and resembles a Person in case of an *Attainder*; and therefore if he purchases Lands, and dies without issue, the Lord by Escheat shall have the Lands.

And therefore in Lineal Descents if there be a Grand-father natural born Subject, Father an Alien, Son natural Subject, the Father is made Denizon, he shall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grandchild (though born after the Denization) shall not inherit the Grandfather, for the Denization does not remove, neither the personal nor the consequential impediment, or incapacity of the Father.

Goldrey and  
Dixons case,  
Hill 16 Jac.B.R.  
Godbolt 275.

So likewise in collateral descents: as for instance, the Father a Natural born Subject has issue two Sons Aliens, who are both made Denizons, and one dies, the other shall not inherit him.

30 H.8. Dy 44

XII. The like Law in Dower: A man seized of Lands in Fee, and takes an Alien to wife, and then dies; the wife shall not be endowed. But if the King takes an Alien to wife and dies, his Widow Queen shall be endowed by the Law of the Crown. Edmund, Brother of King Edward the I. married the Queen of Navarre, and dyed, and it was resolved by all the Judges that she should be endowed of the third part of all the Lands whereof her Husband was seized in Fee.

26 Ed. 1. Rotl p. 1

A Jew born in *England*, the Husband is converted to the Christian faith, purchases Lands, and enfeoffeth another, and dyeth, the Wife brought a Writ of Dower, and was barred of her Dower, *Quia vero contra justitiam est quod ipsa dorem petat, vel habeat de tenemento quod fuit viri sui ex quo in conversione sua noluit cum eo adherere, & cum eo convertere.*

1 Dors clause H.  
3. Memb. 17

Co. l. Inst. fo. 278  
B.

If an Alien be a Disseisor, and obtains Letters of Denization, and then the Disseisor release unto him, the King shall not have the Land; for the release hath altered the Estate, and it is as it were a new purchase, otherwise it is as if the Alien had been the feoffee of the Disseisor.

And though Aliens are enabled by Chartes of Denization, to a transf-

a transmission Hereditary to their posterity of Lands; yet a Deni-  
zon is not capable of Honour, nor a transmission of the same, with-  
out Naturalization by Parliament; for by the Charter of Deniza-  
tion he is made, *quasi seu tamquam ligens*, but to be a Member  
of Parliament he must be *ligens revera, & non quasi*; for by his  
becoming a Nobleman, he claims the place of Judicature in Parlia-  
ment; the which he cannot till naturalized by Act of Parliament,  
and then he may claim as eligible to the same, or any other.

Co. 4. Inst. fol. 47.

# CHAP. IV.

## Of Aliens and Trials *per medietatem*, where allowed, and where not.

- I. Of the manner of Aliens obtaining  
Trials *per medietatem*, at the Com-  
mon-Law, and of the Antiquity of  
the same.
- II. Of the making the same a Law uni-  
versal within this Realm, as to some  
Persons, afterwards general, as to all.
- III. Of the Writ, and some observations  
on the Summons of such an Inquest.
- IV. Of the opportunity lost, or gained  
by praying their immunity.
- V. Of the awarding of Tales upon re-

quest on such Enquiries.

VI. Where this immunity does not ex-  
tend in Aliens, and where it does in  
waters Civil and Criminal.

VII. Of the validity of a witness for an Alien,  
and of an Inquest.

VIII. The title of a *Reverendo*.

IX. Of the benefit of the Kings Pardon,  
whether it extends to an Alien who has  
abode is here, but happens to be absent  
at the time of the promulging.

**I.** *Triatio bilinguis*, or *per medietatem Lingua*, by the Com-  
mon-Law was wont to be obtained by Grant of the King made  
to any Company of Strangers, as to the Society of Lombards, or  
*Almaignes*, or to any other Corporation, or Company, when any  
of them were impleaded, the moyety of the Enquest should be of  
their own Tongue: this Trial *per medietatem* in England is of great  
Antiquity, for in some cases Trials *per medietatem* was before the  
Conquest, *Viri duodecim Jure Consulti, seu Wallia totidem Anglis,*  
& *Wallis jus dicando*, and as the Commentator observes, it was  
called *duodecim Virale Judicium*.

Sanct. Pl. Coron. l.  
3. cap. 7.

Lamb. fol. 91. 3.

II. This immunity afterwards being found commodious to us  
*Islanders* became universal; for by the Statute of 27. E. 3. cap. 8. it  
was enacted, that in Pleas before the *Mayor of the Staple*, if both  
Parties were *Strangers*, the Trial should be by *Strangers*; but if  
one Party was *Stranger*, and the other a *Denizon*, then the Trial  
should be *per medietatem lingua*: But their Statute extended but

Co. 4. Inst. 155.

27 E. 3. cap. 8.



to a narrow compass, viz. Only where both Parties were *Merchants* or *Ministers of the Staple*, and Pleas before the *Mayor of the Staple*; But afterwards in the 28th Year of the same Kings Reign it was enacted, That all manner of Enquests, which was to be taken or made amongst Aliens and Denizens, be they *Merchants*, or others, as well before the *Mayor of the Staple*, as before any other *Judices* or *Justices*. Although the King be party, the one half of the Enquest or proof shall be *Denizens*, the other half *Aliens*, if so many Aliens and Foreiners be in the Town or place where such Enquest or proof is to be taken, that be not parties, nor with the Parties in Contract, in Plea, or other quarrel, whereof such Enquest, or proof ought to be taken; and if there be not so many Aliens then shall there be put in such Enquests or proofs as many Aliens as shall be found in the same Town, or place, which be not thereto Parties, as aforesaid is said; and the remnant of Denizens, which be good men, and not suspicious to the one Party or other.

But if it be for  
Treason. contra  
Hildeposton no. 5.

Dyer 144.

By which Statute the same Custom or immunity was made a Law universal, although it be in the Case of the King, for the Alien shall have his Trial *per medietatem*.

It matters not whether the moiety of Aliens be of the same Country, as the Alien party to the action is; for he may be a *Dutchman*, and they *Spaniards*, *French*, *Walloons*, &c. because the Statute speaks generally of *Aliens*.

III. The Form of the *Venire facias* in this case is, *De Niciet, &c. quorum una medietas sit de Indigenis, & altera medietas sit de alienigenis natis*, &c. And the Sheriff ought to return twelve Aliens, and twelve Denizens, one by the other, with Addition which of them are Aliens, and so they are to be sworn; but if this Order be not observed, it is holden as a misreturn.

Stat. 18, Eliz. cap.  
Cro. 3. part 212.  
241. Bro. tit. trial.

It has been conceived of some, that it is not proper to call it a Trial *per medietatem lingue*, because any Alien of any Tongue may serve; but that surely is no objection, for People are distinguished by their Language, and *medietas lingue* is as much as to say half English, and half of another tongue or Nation whatsoever; nor matters it of what sufficiency the Jurors are, for the form of the *Venire facias* shall not be altered, but the clause of *quorum quilibet habeat, &c.* shall be in.

Cro. 3. part 211.

If both parties are Aliens, then the Inquest shall be all English; for though the English may be supposed to favour themselves more than Strangers, yet when both parties are Aliens, it will be presumed they will favour both alike without any difference.

21 H. 6. 4.

IV. If an Alien is party, who slips his opportunity, and suffers a Trial by all *English*, the same is not a Verdict Erroneous; for if he will be so negligent as to slip that advantage which the Law gives him, it is his fault: for the Alien if he will have the benefit of that Law, he must then pray a *Venire facias per medietatem lingue* at the time of the awarding the *Venire facias*: but if a neglect of that opportunity happens, yet if he prays it after the awarding a general *Venire facias*, the same may be retrieved, so as it be before the *Venire* be returned and filed; for then he may have a *Venire facias de novo*, or otherwise he cannot; nor can he afterwards challenge the Array for this cause, if it falls out the Juries are all Denizens: though *Stamford* seems to be of a contrary opinion, for the Alien must pray it at his peril.

Dyer 28.

Dyer 144. 21 H. 732.

Pl. Coram. 159.  
Dyer 337.

V. If there be a general *Venire facias* the Defendant cannot pray a *Ducem tales*, &c. *per medietatem lingue* upon this, because the *Tales* ought to pursue the *Venire facias*. But if the *Venire facias* be *per medietatem lingue*, the *Tales* ought to be *per medietatem lingue*; as if five Aliens and five Denizens appear on the principal Jury, the Plaintiff may have a *Tales per medietatem*; but if the *Tales* be general *de circumstantibus*, it hath been held good enough, for there being no exception taken by the Defendant upon the awarding thereof, it shall be intended well awarded.

3 E. 4. 11, 12.

Cal. 10 f. 104.

Gr. 3 pars. f. 818  
841.

If an Alien that lives here under the protection of the King of *England*, and amity being between both Kings, commits Treason, he shall by force of the Act of 1. & 2. P. & M. be tried according to the due course of the Common Law, and shall not in that case be tried *per medietatem lingue*.

21 Herb. 4.  
Stamf. 154. Hill.  
36 El. Dr. Lopez  
case by all the  
Judges.

But in case of Petit Treason, Murder, Felony, &c. if he prays his Trial *per medietatem lingue*, the Court ought to grant it.

Vide Dyer fol.  
144. the case of  
Sherily, where  
the point is  
fully handled.

Yet if an Information be exhibited against an Alien, the Trial is not *per medietatem*, but according to the Common Law.

Co. Inst. 3 p. f. 27.  
Moore's 557.  
Barri case.

If an Alien in League brings an action (if there be cause) the Defendant may plead in abatement; but if it be an Alien Enemy, he may conclude in the action.

Calverre Coke  
Entrics sic. Alien  
1. Stamford 160.  
B.  
25 Ed. 3. cap. 8.  
28 Ed. 3. 23.  
2 H. 5. 3.

In an action for words the Defendant pleaded not guilty, and said he was an Alien born; and prayed Trial *per medietatem lingue*, which was granted; and at the *Nisi prius* in London; but six Englishmen, and five Aliens appeared, and the Plaintiff prayed a *Tales de circumstantibus per medietatem lingue*, and it was granted, so there wanted one Alien, and the Record was

Idco alias Alianigena de Circumstantibus per Vie London, ad requisitionem infra nominatus Julli Calatis per mandata Justiciarum

de novo apposto, cujus nomen pannels predicti affilatur secundum formam Statuti in hujusmodi casu nuper editi & provisi. Qui quidem *panes*. sic de novo appostus, viz. Christianus Dechick *allegens* exactus venit, ac in *Juramentum* illam simul cum aliis *Juramentis* predictis, primo impellatur & *Juramentum* juratus fuit, &c. It was found for the Plaintiff, and afterwards moved in Arrest of Judgment. That no *Tales* was to be granted *de Circumstantiis*, when the Trial is *per medietatem Lingua* by the Justices of *Nisi prius*, by the Act of 35. H. 8. because in the Act it is spoken of Free-hold of Jurors; and an Alien is not properly said of any Countrey, or to have any Free-hold; but it was adjudged because the Statute was made for speedy execution, that it should be expounded favourably, according to the intent, and meaning of the Makers of the Act; and though in this case the *Tales* was prayed by the Plaintiff, where it ought to have been *ad requisitionem defendantis*, yet that should be taken to be but a misprision, and would be amended.

V I. If the Plaintiff or Defendant be *Executor* or *Administrator*, though he be an *Alien*, yet the Trial shall be by English, because he sueth; *in an* *et* *or* *or* but if it be averred that the *Testator* or *Intestate* was an *Alien*, then it shall be *per medietatem Lingua*.

*Shelya* French-man who joyned with *Seafford* in the Rebellion, in the taking of *Scarborough Castle* in the County of *York*, he being taken was arraigned in the Kings Bench upon an Indictment of *Treason*, and the Indictment was rul'd to be good, although he was no Subject, because it was in the time of Peace between the *Queen* and the *French King*. But if it had been in the time of *War*, then the Party should not have been indicted, but *ransomed*. It was likewise rul'd there, that the Trial was good, although the *Ventre facias* awarded in *York* was general, and not *per medietatem lingue*; for such Trial *per medietatem lingue* does not extend to *Treasons*, 4. *Ma. Dyer* 145. the Indictment ought to omit the words *Naturalem Dominam suam*, and begin that he intended *Treason contra Dominam Regiam*, &c. *Hill. 36. Eliz. in B.R. Stephens Ferraro d'Games* case in *Cr. Lopez* *Treason*.

If an *Alien Enemy* come into this Realm, and be taken in *War*, he cannot be indicted of *Treason*, for the Indictment cannot conclude *contra legantia sua debitorum*, for he never was in the protection of the King; and therefore he shall suffer death by *Marshal Law*, and so it was rul'd in 13. H. 7. in *Perkin Warbeck's* case, who being an *Alien* born in *Flanders*, feigned himself to be one of the Sons of *King Edward the 4th*, and invaded the Realm, with intent to take upon him the Dignity, who

*Mich. 35. 36.*  
*Eliz. in B.R. Sir*  
*Julius Caesar*  
*Versus Philip*  
*Corfin.*

*Cr. 3. part 273*

who had his Judgment and Trial by *Martial Law*, and not by the Common-Law of *England*.

VII. The Kingdom of *Ireland* was a Dominion separated, and divided from *England* at the first, and came to the Crown of *England* by Conquest, in the time of *Henry the Second*; and the meer *Irish* were as *Aliens*, Enemies to the Crown of *England*, and were disabled to bring any action, and were out of the protection of the Laws of this Realm, and five *Scepts* of the *Irish Nation* were only enabled to the Laws of *England*, viz. *Quait de Ultonia*, *O Molloghlin de Media*, *O Connoghor de Connacia*, *O Brian de Theilmanno*, and *Mac Murogh de Lagenio*, as appears by the Records of the Dominion of *Ireland*, and several grants have been made to the *Irish*, which proves them to be meer *Aliens*. But afterwards, though the same was a separate and divided Kingdom, yet whilst they were under the subjection and obedience of the Kings of *England*, if *High Treason* had been committed by an *Irish man*, he might be arraigned, indicted, and tried for the same within *England*, and by the Laws of *England*; and so it was resolved by all the Judges of *England* in *Oruck's case*, 33. *Eliz.* and also in *Sir John Perrot's case*, that *Ireland* was out of *England*, and yet that all *Treasons* committed there were to be tried in *England*, and that by virtue of the Statute of 31 *H. 1. cap. 23.*

Sir John Davis  
Conquest of  
*Ireland* fol. 103.  
104. 105.

Co. 7. fol. 23.  
Calvins case.

*Arthur Crobagan*, an *Irish man*, was arraigned, for that he being the Kings Subject, at *Lisbon* in *Spain* used these words, *I will kill the King* (*inuendo Dominum Carolum Regem Angliæ*) if I may come unto him, because he is a *Heresick*; but afterwards he came into *England*, and was taken, and tried by a Jury of *Middlesex*, and was found guilty; and it was held *High Treason* by the Course of the Common Law, for his Traiterous intent, and imagination of his heart is declared by these words, and within the Statute 25 *E. 3.* He confessed he was a *Dominican Fryar*, and Priest in *Spain*.

Mich. 4. Car. 12.  
Cro. fol. 242.

*Bracton* sayes, that an *Alien born* cannot be a witness; but that is to be understood of an *Alien infidel*: for the Bishop of *Ross*, being an *Alien born* (a *Scot*) was admitted to be a witness, and sworn.

14 *Eliz.* in the  
case of the Duke  
of *Norfolk* Co.  
last. 4. pt. 276.

Yet an *Infidel* may bring an action against another Merchant, or any other however, and that without controverſie.

\* 11 *H. 3.* fol. 4.

The testimony of a *Renegado* is not to be received at this day, by the Laws of any *Christian Kingdom*, or *Republique*; he that hath once renounced his Faith can never be believed, therefore he cannot be a witness; and so it was rul'd where one *Domingo de la Carda*, a *Renegado*, who was sworn, and gave evidence; afterwards a new Trial being granted, his testimony was rejected, and he not suffered to

Hill. 17. 18. Car.  
2di in B. R. Robt.  
Vos. Longston.

be sworn, it being at his Trial proved that he was a *Spaniard*; and a *Christian* by birth and education, and after became a *Jew*.

If an *Alien* be resident, and commits an offence, he shall have the benefit of the Kings general pardon; but if he is *not* in the Kingdom at the time of the pardon promulgated, then he loses the same; for he is no otherwise a Subject but by his residence here.

## CHAP. V.

### Of Planters.

- I. Of Possession, and its original right.
- II. Of Vacancies natural, which gives a right to Planters.
- III. Of Civil Vacancies, how far the same may be possessed.
- IV. Of Planters, whether they have a firm right, so as to dispose by Will, or only a *Usufructuary* possession.
- V. Of Planters wanting things necessary for the support of humane life, generally considered according to the Laws of Nature.
- VI. Wherefore one man may naturally have more than another, and what conditions are annexed to such for-  
tunes for those that are in necessity.
- VII. Whence it is that there was at the beginning, and is still a tacit condition of reassuming our Original rights in case of extremum or natural necessity for natural Community.
- VIII. Of necessity considered in a Christian Community.
- IX. Of the Primitive Communion, considered in reference to its restrictions and limitations.
- X. Of those things that are dedicated to God and holy use, whether subject to the relief of our necessities.

**H**AVING in the first Chapter of this Book discoursed of the original of property deducing its inception, to that which we call possession or *metum*, and how the same may be altered by War; it may not seem unnecessary to discourse of the acquiring of property in the new discoveries of those vast immensities of *America*, which being prepossessed seem to deny us legally that title which we pretend to.

Possession by Law is esteemed the highest title that men can pretend to what they enjoy, which is nothing else but *posseio pedis*; as if the Ancients had no other seal to confirm their tenures, but the prints of their feet; and good reason, seeing the mind is not able to take up a place so well as the Body; for many mens wills may concur in (wishing and liking) the same thing, but many bodies cannot concur to the possessing it. Besides, the mind cannot set an outward mark on what it likes, that thereby others might be warned to abstain from it, all which the Body properly doth. *Abraham* and *Lot* going to plant, declared no more than this, *there was room or vacancy enough,*



enough, and therefore, without further examination, or scruple, they knew they might turn to the right hand or to the left, to possess what they would to themselves.

II. This vacancy, which gives us a right to plant, is to be considered in two respects, 1. Natural, 2. Civil: the first is in things which may be possess'd, but actually are not, neither, in property, nor use; such a Vacancy which is *nullius in bonis*, might be occupied by *Switzers*, who as *Cæsar* saith, would fain have changed their rough Hills for some near *Campania*; and Deserts or Places uninhabited, may be possess'd and appropriated to the first Planter, and that without all controversy, but especially by those who being expelled from their own Seats or Estate, seek entertainment abroad: The *Ausebarians* in *Tacitus* cry out, as the Heaven to the Gods, so is the Earth granted to Mortals, and what is void is publick: Looking up to the Sun and Stars, they did openly as it were enquire of them, Whether they were pleas'd in beholding any ground empty, and without Inhabitants, they should rather cast forth the Sea, and overwhelm the Spoilers of the Earth.

III. Civil Vacancy; is where it is not absolutely incorporated, as among the roving *Arabians* and *Moores* in *Barbary*, and other *Africans* and *Americans*, who possess one place to day and another to morrow; these by their frequent returns, shew that they abandon not the Places they remove from, as *derelicta quæ quis in bonis amplius numerare non vult*; we cannot lay, that their natural, or voluntary interest in them is no way improved; for *Grotius* seems to be of opinion\*, that if there be some Desert or barren ground, the same ought to be granted to Strangers upon their request; and, says he, It is also rightly seized on by them, giving this reason, For that Lands ought not to be esteem'd occupied which are not cultivated; but only as to the Empire, which remains entire to the first People, they do no offence who inhabit, and manure a part of the Land that lyes neglected.

But we must press this argument of *Grotius* very tenderly, lest by the same reason others conclude, that those Estates which are not competently improved, are derelict and occupiable by others, which would introduce perpetual confusions; and easily persuade every man that he could husband his Neighbours Lands better then himself: However this is a clear Case for all Planters, that those wastes, or *asperimontes*, which the Natives make no use of, nor can receive any damage by their being possess'd by others, may lawfully be impropriated by them.

IV. But admitting that Planters may appropriate a Plantation for

*Tacitus Annal.*  
13. *quæ cum sit*  
*derelicta*

*Ubi nec possessio  
est plane in homi-  
ne, nec homogene-  
in possessione.*

\* *De iure belli de  
P. 1. lib. 2. cap. 2.  
§. 17.*

*Dion. Prusæ-  
ses Græc. 50.*

*Recte sicta est  
concessio, quæ est  
sine damno alio-  
rums.*

\* As it is con-  
sistent to nature  
that my share of  
substance,  
which was be-  
fore uncertain,  
should now be  
fixed, so it is ne-  
cessary that the  
consent which

others gave to this at first, should stand fixed, especially if there was no obligation, or decla-  
ration at the first to the contrary. *Vide Selden de Jure Na. et gen. ad mon. Hob. id. obligat. quod est  
ex officio quod legis est:* But the sanction of a Law supposes the nullity of a State of nature; not a  
right of nature.

V. Again Persons having arrived in those Territories, and Plan-  
ted, but before they have reapt the fruits of their labour, necessity  
is found within their Huts, and a supply of things for the support of  
humane life is wanting, whether such may seek the means of subsis-  
tance by the Laws of nature, and in case of refusal (after request) force  
them from their Neighbour Planter? Surely that which is necessary for  
any natural substance, and necessary to another, belongs justly to  
me, unless I have merited to lose the life which I seek to preserve.  
There were a defect in Gods creating our natures such as they are,  
if he did not provide means to uphold their beings, according to  
the natural faculties which he hath given them. A good Mother  
divides her bread among her Children as a morsel may come  
to each; let us therefore judge this case, if a Father in his Will  
pass by a Child or names him; but upon false causes leaves him no-  
thing, he is notwithstanding by the equity of the Civil Law admitted  
to a Childs part as *legitimate*, and may form his action *contra Testa-*  
*mentum inofficiosum*: Men are all in kin, and we derive one from ano-  
ther, and to let others settle in our places, who may justly expect as  
much due to them for their natural subsistence, as was to those who  
before went out of the World, to make place for them, yea though  
they assign them nothing at their departure.

Man were of all living Creatures most miserable, if he might not  
during this life have that measure, which God would not have an  
Ox defrauded of; thus hath every Dung-hill-fly a right to live,  
and to remain insectile, which besides existence hath sense, and may  
not justly be deprived of that its chiefest felicity, unless it be im-  
portunate to a nobler Creature.

*Pia mater panem  
inter liberos di-  
stribuit, ut fru-  
ctum veniat sin-  
gulis.*

VI. 'Tis very true, that no man can pretend to share in the sweat of another mans brows, or that the pains and waisting of another mans life should be for the maintenance of any but his own; nay though it be granted, that those Neighbour Planters, who being settled before us, and having acquired either by industry or lawful donation the fruits of other mens labours, and consequently must enjoy more plenty then a new Comer or Planter; yet all that they possess is not properly theirs, for if another by extream necessity be perishing, and they have above what they can consume in a natural way, then they have no fuller a property in that plenty then Stewards have, and for this regard they are so called in Scripture: *The Earth still is the Lords, and the fulness of it; it is his, for he made it of his own matter, and for the fashion of it used not our aid; yea, 'tis his Sun which still produces, and his Clouds which drop fatness.*: We can only pretend the Contribution of a little pains, for that which is our natural share; so that in plain reason we may not expect to be otherwise qualified then Stewards, for all that which is not probably necessary for our own subsistence, or for theirs, who subsist only by us: Wherefore if *Lazarus* ready to perish (not by fault but by misfortune) had taken *Dives* his Crums contrary to his will; yet he had not sinned no more then he who takes something which the Lord or Master hath given him, though the Steward contradict it: But if it so happen, that both the Planters are *in pari necessitate*, then *melior est conditio possidentis*; or, as Saint Paul's words are, when he excited the Churches Charity and Alms for the relief of the distressed Members of Christ, *Nor* (quoth he) *that ye should be streightened, and they abound.*

VII. The will of those who first consented mutually to divide the Earth into particular Possessions, was certainly such as receded as little as might be from natural equity; for written Laws are as near as possible may be to be interpreted by that; and therefore in cases of such extremities we are not without examples, of taking the goods of one to supply the necessities of many. And therefore at Sea, if Provisions begin to fail in a Ship, every one may be forced to bring out openly what he laid in for his passage in particular: so a Ship at Sea, having in stress of Weather spent her Sails, Cordage, and Anchors, meeting other Vessels at Sea, may take a supply of such as shall be wanting; but yet governed according to St. Paul's word, so that such taking streightens not the other Ship. So when the Sea breaks in upon a Countrey, we may dig in the next mans grounds to a make a bank, without staying for the owners permission; yea tear down any mans hedge or fence, when the Common passage

\* Xenophon in his Answer to the Sinopenes, *Ubi jus nemendi nobis non conceditur, siue in Barbico, siue in Graecico solo, ubi quae opus sumus, non per praeterviam, sed ex necessitate expedit.* Cyr.

Lessias lib. 7. cap. 12. dub. 12. num. 70.

2 Cor. 8. 13.

Grotius de jure Belli ac Pacis lib. 2. cap. 2. § 8. 9. *Leges humanae obligant, nisi factae sunt, scilicet cum sensu humanae imbecillitatis.*

is stopped: For in such cases of necessity humane Laws (as is mentioned afore) do not so much permit as expound their natural equity; and that which Men give to those who are so innocently distressed, which borrow life only from the shadows of death; *Est pistor se tempestate tuetur*, is not so properly a Charity to them as a duty; and if he be a Christian that gives, perhaps he doth more Charity to himself then to the Receiver.

VIII. The reason of this Christian Charity, or Communion, is as far above the natural, as Christ himself was above Nature, this requires an equal beating of all pulses, that as Fellow-Members we have a *Homogenial* tence and palpitation; we are to divide a Cruze of Oil, and a few handfuls of meal, with one of Christs Flock, with an abandoned Creature; and what can be in more extremity than a poor Planter, in a strange Place, destitute for the present of the supports of humane life.

And surely the violation of this *Jus Charitatis* is no less then theft, in those who having extended fortunes, never defalcate a *Gibeonites* Crust perhaps for a *Wandering Angel*: these steal even the Ship-wreck'd mans picture from him, which as his whole inheritance he carried at his back, to move compassion, and by the insatiable Sea of their Avarice, and Luxury, they wreck him over at Land.

But this free Primitive Communion had, and hath its bounds, and its quantum in Contributions, as well as the natural, otherwise it might be fraudulent, and thieving: For they who possess but a little, would contribute it all, on purpose to share equally with those who possess very much, which would introduce a visible decay, and ruin in all, as *Tiberius* rightly observed \*, on *M. Hortalus* his petitioning an Alms for *Augustus Caesar's* sake, *Idleness would encrease, and industry languish, if men should entertain no hope, no fear for themselves, but securely expect other mens relief, idle to themselves, and burthen-some to us.*

Wherefore in the midst of that primitive Communion, we find that the Apostles went *Domatim*, from house to house breaking of bread, therefore they even then retained by their houses in property, which property is supposed by the eighth Commandment, as well as it is by Christian Charity: For no man can steal, but by invading the right of another; and as for Charity, it is necessary he have something of his own, to be able to fulfil its commands, and to make a dole at his door; and it is very convenient that he give it rather with his own hand, then by some publique Collectors, *For Charity is hated most with the sense of its own action.* Moreover under the Laws, Jews were commanded, *to love one another as themselves*; yet this Command took not away pro-

*Ne quicquam  
fundo suspirat  
nummi in ima.*

\* *Intenditur in-  
quit soordia,  
lauesces indu-  
stria si nullus ex  
se metus aut spes,  
& securi omnes  
aliena subsidia  
expectabunt, sibi  
ignavi, & nobis  
gravis. Tacit.*

*Matth. 7. 11.*

pro-

property then, therefore it takes it not away now; notwithstanding we own the use, or usufruct of our properties to the distressed, though our selves be at the same time in distress; just as we are commanded, by the peril of our own lives, to endeavour to secure our Neighbours life, which is yet a Charity more transcendent than the other, by how much life is above livelihood. And though the various Laws of Countreys have variously provided punishment for those, who out of meer necessity take something out of anothers plenty; yet that proves not the Act to be sin, or repugnant to equity, or conscience, but rather repugnant to the conveniency of that Kingdom, or Republique, where the Act is committed; and the true reason of the same is, lest thereby a gap might be laid open to Libertinism. Besides, Reason of State, we know, considers not virtue, so much as publick quiet and conveniency, or that right which is *ad alterum*.

X. We will now consider those things which are Gods, which yet are not his in such a strict rigorous sence, but that they lye open to the exceptions of our just necessities. Hence that which is devoted as a Sacrifice to him, in case of necessity, may be made our dinner, witness the action of *David*: Wherefore the consequence of our Savjours answer was very strong, when he defended his pulling the Eares of Corn in anothers Field: That it it was lawful for *David* in his necessity to eat that Bread, which was provided for the Table of God; then how much more was it lawful for him, and his Apostles in their necessities, to take a refreshing out of that which belonged to Man? By the Canon Law, if no other means can be found, the Vessels of the Altar may be sold, to redeem those Souls, who are enthralled in misery, and captivity; and is there not good reason for it, seeing they serve but for the Souls of Men, and therefore the Souls of Men are more precious than they: Yea the sacrifice it self, to what end is it, but to obtain a state of piety for us.

Upon what hath been said, it may not seem an injury if a Planter (wanting those things for the support of humane life, requesting a reasonable proportion of his Neighbour (having it to spare) with an intention to repay, if denied, by force take the same from him; for that reason which creates a punishment in a settled Commonwealth for the like actions, does in such places fail.

*Decretals of Gratian lib. Synodus Nicacensis can. Synodus Aurel. censu 1. Can. Concilium Tolosanum.*

*Grotius de Jure Belli ac Pacis l. 2. cap. 2 §. 8. 9.*



## CHAP. VI

## Of Merchants.

- I. *Merchandizing, the same is honourable, and profitable, both to Prince and State.*
- II. *The advantages that might accrue to Kingdoms, if the more Nobler and Richer sort applied themselves to the same.*
- III. *Of the first Institution of the Company of Adventurers.*
- IV. *Of the Institution of that in England to the Indies.*
- V. *Of the forming of that in Holland to those parts.*
- VI. *Of the forming the like by the Most Christian King to the same parts.*
- VII. *Of the advantages, and disadvantages, considered as in reference to reducing them to Companies.*
- VIII. *How Merchants in England were provided for of old.*
- IX. *Of their immunities settled by Magna Charta.*
- X. *Of Merchants Strangers, whose Prince is in War with the Crown of England, how to be used in the time of War, and the reasons why Merchants Strangers ought to be used fairly.*
- XI. *Goods brought in by them, the Moneys raised how to be disposed according to the Statute of Employment.*
- XII. *Merchants Strangers made Denizens by Parliaments, or Letters Patents, to pay as before they were so made.*
- XIII. *What things requisite that make a Competent Merchant according to Law.*
- XIV. *One Merchant may have an Account against his Partner, and if he dyes, no Survivorship to be of the Estate belonging or acquired in their Traffique.*
- XV. *Of their Immunities, which they claim by the Custom of Merchants, in reference to Exchange.*
- XVI. *All Subjects are restrained to depart the Realm; but Merchants.*
- XVII. *Prohibitory Laws bind Foreigners according to the League of Nations.*
- XVIII. *The necessity and advantage that is incumbent on Merchants to preserve their marks.*

**L** Here are certain affairs which should be left to the poor and common People to enrich them, but there are others which they only can execute which are rich; as that at Sea by way of Merchandizing, which is the most profitable in an Estate, and to the which they should attribute more honour than some do here at this day. For if in all Estates they have thought it fitting, to invite the subjects by honour to the most painful, and dangerous actions, the which might be profitable to the Publick; this being of that quality, they should attribute more honours to those that deal in it: And if Nobility hath taken its foundation from the courage of Men, and from their valour, there is certainly no vocation in the which there is so much required as in this, they are not only to encounter, and strive amongst Men, but sometimes against the four Elements together; which is the strongest proof that can be of the Resolution of Man.

\* *Prætor mercatoris summi Navis seu militari, & salutanda in mari contra externam vim reipubl. infervere ceperunt.*  
Aristot. 7. Pol. mare & classem in bello esse tutellam reipubl. air

Man. This hath been the occasion, that some have been of opinion, that they should open this door to Merchants, to attain to Nobility, so as the Father and Son hath continued in the same Trade, and to suffer Noble Men, who are commonly the richest in an Estate, to practise themselves (without prejudice to their condition) in this of Commerce; the which would be more honourable unto them then to be Usurers, and Bankers, as in Italy; or to impoverish themselves, in doing nothing but spend and make consumption of their fortunes, and never gathering or laying up.

Tacitus 4. Hist. Classis Imperii munimenta vocat Atheniensium legati apud Thucydidem lib. 1. Histor. Orai. ad Lacedaemonians, fortunae Gracia in navium praesidio sitas fuisse

pradican, eius rei muri lignei Themistocles abunde fidem fecerunt, idem experientia satis hodie loquitur. Inde Cosmi Mediceo familiari suis dictum, Non habendum potentem qui potentiae terrestri, non simul etiam navalem haberet conjunctam. Et Hispanorum est adagium, Regnum sine Portu esse sicut furnum absque igne: praeterquam quid navigationes cultus vitae, et artium translationi Coloniarum valetudine, et voluptati serviant.

II. Hence will grow many advantages, both to the publique, and private; To the publique, for that they that should deal in Commerce, having means, courage, and sufficiency for this conduct, it would be far greater in the furnishing more Ships to Sea, and better armed, the which the Estate at need might make use of for the safety of the Publick; and would adde to the reputation of the Nation in all parts, they knowing that an indignity, or damage offered to such would require satisfaction with a strong and powerfull hand; the which they cannot do, who being poor, and having but small stocks, or what they borrow from Bankers, or are indebted for the Cargo which they send forth, have not the courage to hazard themselves, and their all in an enterprize that is great: Besides, such who have honour, riches; and courage, would keep up the reputation of their severall Commodities, by the not lessening the Market, the which the poorer sort, to pay Customes, Freight, Bills of Exchange, and other contingent, and necessary charges, which accompanies the importing, they are often forced to mortgage the Cargo to the Bankers, at excessive usury, or else to sell for ready money, for an inconsiderable gain, nay, some rather then their wants to be known, for ready money will sell for loss; all which would be prevented, if such Persons of value would apply themselves to a prudent management of the same; for whatsoever hazard they run, there would be more gotten by such in 20 Voyages, then the smaller sort in three or four Voyages, and by that means it would be the occasion of preventing of many expenses, or importuning their Prince with demands; nay perhaps, they might get more at Sea in one year, then in ten at Court. Besides experience hath taught, and doth daily manifest, that where the richest

have dealt in this of Commerce, it hath enriched both them, and the Estate under which they lived; and this day the Examples of the *Venetians, Portugals, Spaniards, and Hollanders* have made it known unto us.

III. The consideration of which first gave light to that industrious Nation the *Burgundians*, to procure the Association, or Incorporation by *John Duke of Brabant*; of that Ancient Company of the *Adventurers Anno 1248*, which were then called the *Brotherhood of Saint Thomas Becket of Canterbury*; which being afterwards translated into *England*, was by *Edward the III.* confirmed, and by his Successors *Henry the IV. Henry V. Ed. IV. Henry VI. Richard III.* and King *Henry the Seventh*, who gave them the name of Merchant *Adventurers*, and from him successively hath their Charter been confirmed down to his sacred Majesty that new is; and as this Society is of Ancient estimation, so is their Government very commendable.

IV. The Society of the Company trading to the *East Indies* differ from others, both as in reference to the Persons, Members which are at this day many of the principal Nobility of *England*; as also for that their *Adventurers* run all into many stocks, and is governed and carried all jointly upon benefit, and loss, they were incorporate *Anno 1599.* and since then they surrendered their Charter, and accepted a new one; and are incorporated by the name of *Governour, and Company trading to the East Indies*; their *Adventurers* run all into one Stock, and is governed and carried on upon benefit and loss; the same being at this day, according to the Subscriptions, about four hundred thousand Pounds, which the several Persons Subscribers may sell, transfer, and dispose of; but they can no wayes take out the same. The great Stock may be increased, if the Company shall see occasion so to permit; but they are very cautious of the same, for that the greater Dividends, the more reputation the Stock bears, which above all things is to be maintained; however directly upon his own account no Person can have above ten thousand Pounds Stock there, nor can he have a compleat title till he is made a Freeman of that Society; their returns are very rich, and have many Places of great importance in *India*, as *Mesopotam* on the Coast of *Cormondel, Bombay, Surat, Fort S. George, Bantam, &c.*

V. The *Dutch* having found relief in their distress from the *British* shore against their powerful Enemy, found also a pattern to carry on Commerce, they not being wanting in the imitating the Incorporation of a Company trading to those Places which they

they possess'd in the *East Indies*; and therefore in the Year 1602. leave was granted from the Estates to traffique into those Parts before all others; during the space of one and twenty years, the which was granted them, in consideration of five and twenty thousand *Florens*, which they promised to pay to the Estate during the first ten years. Thus reduced all into one Company, *Amsterdam* had one moyety, *Middelburgh* in *Zealand* a fourth part, *Delph*, *Rotterdam*, *Hoorn*, and *Enchusen* had either of them a sixth part, and the whole Stock of this Union amounted to six millions of *Livers*, or six hundred thousand pounds *Sterling*.

For the direction of this Trade, and the interests of the Associates, they have established, in either of those Towns a certain number of Administrators, at *Amsterdam* twenty, at *Middleburgh*, twelve in either of the rest seven; and if any dyes, the Chamber of the Place names three, of which either the Estate General, or the Magistrate of the Town chooseth one.

Those Chambers choose seventeen among the Administrators, that is to say, *Amsterdam* eight, *Middleburgh* four; *Delph* and *Rotterdam* two, *Hoorn* and *Enchusen* two; and the seventeen are chosen alternatively, sometimes at *Middleburgh*, sometimes at *North-Holland*; the which are called together to resolve jointly of how many Ships, and of what Equipage and Furniture they shall make the Fleet which they mean to send, and to what Fort or Coast they should go. This Assembly is held six years together at *Amsterdam*, and afterwards two years at *Middleburgh*, and then again at *Amsterdam*. By the conditions of the accord the Ships must return to the same Port from which they parted; and the Spices which are left at *Middleburgh*, and other Chambers, is distributed amongst them by the weight of *Amsterdam*, and the Chamber which hath sold her Spices may buy from other Chambers.

By this Order they have hitherto continued this Commerce with reputation, not as simple Merchants only, but as if they were Sovereigns, they have made in the Names of the Estates Alliances, with many of the Princes of those parts; as with the Kings of *Siam*, *Quadoen*, *Param*, *Jabor*, the Heir of *Mataca*, *Bornean*, *Achin*, *Simarra*, *Baretam*, *Jocotra*, and other Kings of *Java*; they have made themselves absolute Masters of the Island of *Amboyna*, but by what means? — Where they have a President, which governs in their name. At *Banda* they have a Fort for a retreat, where they must deliver them the Spices at a certain price. In *Trinative* they have another a mile distant of that of the *Portugals*; at *Magienne* they have three; at *Mosine* one; at *Gilolo* they have taken that

that which the *Portugals* have built; and indeed whatsoever either can, or many consist with their interest in those parts, they have engrossed, and by that means almost the Trade of the whole Spices of the *East*.

VI. So likewise the most Christian King hath within few years established such another Trading to those *Eastern* Parts.

And in *England* we have several others, as that of trading to *Turkey*, that of *Africa*, to *Guiny*, and several others, dividing the several Trades according to the Coasts and Places where they are appointed; forbidding them to trench or incroach on each other, so likewise to all other his Majesties Subjects, on severe penalties.

VII. Now it is not the dividing of the Trade into Companies, that can answer the expectation, but it is the dividing the Trade into Companies where the Places may bear it; as that to the *Indies*, *Turkey*, *Hambourgh*, and some others. But to some others, as the *Canaries*, *France*, or any of those Places on this side the Line, it has been conceived; the Trade will not bear it, but the same would be better distributed, either into the Trade of voluntary Associations, or single Traders: others perhaps would reluk into Monopolies, if incorporated; however the Standard rule is, to know whether the Trade of the Place will bear a Company, or not.

VIII. Merchants in *England* were always favourably provided for by the Common Law of this Kingdom: By the Ancient Laws of King *Alfred* it was provided; *Defensio tunc que nui Merchant Alien ne hautati Anglietore, forsque auquiter foires, ne que nul demerast in la terre outte quarante jours: Mercatorum navigia, vel inuicem quidem; quacunque ex alto (nulli) iactura temporaliibus; in portum aliquem inuehantur tranquilla pace fruantur, quin etiam in maris uictibus, ad domicilium aliquod illastre, ac pacis beneficia donatum navis appulerit inimica, acquirunt nautae confugerint, ipsi & res illorum omnes angusta pace patiuntur.*

IX. Again, by the Grand Charter of our Liberties they are provided for in these words: *Omnes Mercatores huius publicae antea prohibiti fuerint; habeant saluam et securam condictionem, exire de Anglia, et venire in Angliam, et morari, et ire per Angliam, tam per terram, quam per aquam, ad emendum, et al vendendum, sine omnibus malis uolentis per antiquas et rectas consuetudines, praeterquam in tempore guerra. Et sine de terra contra nos guerrina, et tales in veniantur in terra nostra in principio guerra, attachiantur sine damno corporum suorum, vel rerum, donec satisfiat a nobis, vel a Capitali Iusticiario nostro, quomodo Mercationes terre nostra tractantur, qui tunc inueniantur in terra illa contra nos*

*Mirror cap. 2.  
fol. 3.  
Intr. leges Ethel.  
cap.*

*Magna Charta  
cap. 30.*

*guroci.*



*guerrina. Et si nostri salvi sunt ibi, alii salvi sunt in terra nostra.*

1. By which it is declared, that all Merchant Strangers might be publickly prohibited to Trade into this Realm, be they in Amity, or otherwise.

2. All Merchant Strangers in Amity, except such as be so publickly prohibited, shall have safe and sure conduct in seven things.

- |                                      |                   |
|--------------------------------------|-------------------|
| 1. To depart out of                  | } <i>England.</i> |
| 2. To come into                      |                   |
| 3. To Tarry in                       |                   |
| 4. By Water, and Land to go in,      |                   |
| and thorough                         |                   |
| 5. To buy, and sell in               |                   |
| 6. Without any manner of evil Tolls. |                   |
| 7. By old and rightful Customs.      |                   |

X. But concerning such Merchant Strangers, whose Prince is in War with the Crown of *England*, if they are found within the Realm, at the beginning of the War, they shall be attached with a Privilege and Limitation, i. e. without harm of Body, or Goods; with this limitation, until it be known to the King, or his Chief Justice\*, how Merchants of *England* are used and intreated in their Country; and accordingly they shall be used in *England*, the same being *ius Belli*. But for Merchant Strangers, that come into the Realm after War begun, they may be dealt withall as open Enemies: It being the Policy of *England* ever to entertain Merchant Strangers fairly. In the 18. year of *Ed. 1.* in the Parliament Roll it is contained thus: *Cives London petunt, quod alienigena Mercatores expellantur a Civitate, quia dicantur ad depauperationem Civium, &c. — Responsio. — Rex intendit quod Mercatores extranei sunt idonei, & utiles magnatibus, &c. & non habet Concilium eas expellendi.* However though great Immunities were granted them, yet they alwayes found Sureties, that they should not carry out the Merchandize which they brought in.

XI. And at this day, if they bring in any any Merchandize into the realm, and sell the same for Moneys, they are to bestow the same upon other Merchandizes of *England*, without carrying of any Gold or Silver in coin, plate or mass out, on forfeiture. The principal reason of this was, as well to preserve and keep Gold and Silver within the Realm, as for the encrease of the Manufactures; and the same at this day extends as well to Denizons, so made by Letters Patents, as Strangers; however he may use the same in payment to the Kings Liege People, without \* incurring the penalty of the

\* That is the Keeper of the Realm in his absence.

*Et in Republica maxime conservanda sunt jura Belli, Co. 2. Inst. fol. 58.*

*Rot. Parliamenti 18. E. 1. f. 4. n. 55.*

*Rot. Parliamenti 18. E. 2. m. 21.*

*4 H. 4. Co. 3. 5 H. 4. Co. 9.*

\* Stat. 17. E. 4. c. 1. confirmed by 3 H. 7. c. 2.

Statute of 4. H. 4. but yet in strictness of Law ought not to receive any Gold in payment.

† 8 H. 5. c. 14.

11 H. 7. c. 14.

22 H. 8. 1. Eliz.

c. 1. Co. 2. Inst. fol.

742.

Leg. unic. Cod. de

nund. & Alceat.

in Leg. mercis 66

& in Leg. mercis

207. de verb. sig.

nif.

C. ejiciens 28. dist.

Paul. de Castr. in

Leg. cum ff. de

Inst.

F. N. B. 117. B.

38 E. 3. Co. 09

Littleton fo. 182.

Per Legem mer-

catorem, ius ac-

cessandi inter

mercatores pro

beneficio, Com-

mercii locum non

habet.

Co. for Litt. fol.

up. lib. Instat.

fol. 17. 2. 19.

Martin versus

Bow, 1 Jac. B.

R. 2. Cro. fol. 7.

Vid. tit. En-

change.

XII. All Merchant Strangers that shall be made Denizens, either by the Kings Letters Patents, or by Act of Parliament, must pay for their Merchandize like Custom, and Subsidy, as they ought or should pay before they were made Denizens.

XIII. Every one that buys and sells is not from thence to be denominated a Merchant; but only he who traffiques in the way of Commerce, by importation or exportation, or otherwise in the way of emption, vendition, barter, permutation, or exchange, and which makes it his living to buy and sell, and that by a continued assiduity, or frequent negotiation in the mystery of merchandizing. But those that buy Goods, to reduce them by their own art or industry into other forms then formerly they were of, are properly called Artificers, not Merchants. Nor but Merchants may and do alter Commodities after they have bought them, for the more expedite Sale of them; but that renders them not Artificers, but the same is part of the mystery of Merchants. But Persons buying Commodities, though they alter not the form, yet if they are such as sell the same at future days of payment, for greater price then they cost them, they are not properly called Merchants, but are Usurers; though they obtain several other names, as *Warehouse Keepers*, &c. the like, but Bankers, and such as deal by Exchange, are properly called Merchants.

XIV. The Wares, Merchandize, Debts, or Duties, that Merchants have as joyned Traders or Partners, shall not go to the Survivors, but shall go to the Executor of him that is deceased.

If two joyned Merchants occupy their Stock, Goods, and Merchandize in common to their common profit, one of them, naming of himself a Merchant shall have an account against the other coming him a Merchant, and shall charge him as *Respondeat de mercatoribus*. B. ex quacunque causa & contractu ad communem utilitatem occupantibus A. & B. proventus, sicut per legem Admercatoriam recipiunt, inter monstrare poterit.

XV. And as the Law establishes security for their Estates, so it gives them other immunities in their commerce; for if one Merchant draws a Bill of Exchange upon another, be it in Land or out Land, (if it be by way of Exchange) the acceptance of the Bill by the Party shall bind him to that party, to whole use the Money in the Bill is to be paid, and he may bring his action in his own name *per legem mercatoriam*.

And so it is if a third Person, that is a Stranger to the Bill, shall accept

accept the same for the honour of the Drawer, it shall bind him as effectually, as if he upon whom the Bill was drawn had accepted it; and this by the Custom of Merchants.

XV. All other Subjects are restrained to depart the Realm, to live out of the Realm, and out of the Kings Obedience, if the King so thinks fit; but Merchants are not, for they may depart, and the same is no contempt, they being excepted out of the Statute of 1. Hen. 2. cap. 2. And by the Common Law they might pass the Seas without Licence, though not to Merchandize.

Mich. 12. C. 11  
Elix. Dy. fol.  
296. Pa. 21.  
Elix. fol. 175. 1.

XVII. It was once conceived, that those Laws which were prohibitory against Foreign Goods did not bind a Merchant Stranger, but it was ruled otherwise: For in the Leagues that are now established between Nation and Nation, the Laws of either Kingdom are excepted; and therefore as the *English* in *France*, or in any other Nation in *Europe*, are subject to the Laws of that Countrey where they reside; so must they of *France*, or of any other Countrey, be subject to the Laws of *England*, when resident or here; and therefore if a *French* Man imports any Points, Laces, Belts, Hats, and the like, they are forfeited.

19 H. 7.

*Tomlinson qui  
tam vers. Henry  
de Vale Pasca,  
36 Eliz. in the  
Exchequer.*

XVIII. The marking of Goods is of a great consequence, as in relation to the selling the property of the Merchandise in the right Owner; and in Courts of Justice, both the Civil Law, and the Common Law, hath a great respect to the same, therefore the use has been, that every particular Merchant, both his particular mark appropriated to him; by which means, if the Person is of any value considerable, as in relation to Commerce, his mark is presently known.

Every Merchant is to set down his mark upon his Books of Account, where with his Commodities are marked; so Companies and Societies have their particular mark: No Merchant ought to use another mark, without leave first had of the Party whose mark the same is; for as Flags are the Ensigns that give confidence of the Nation whose Ships they are, so marks are to ascertain the Owners of their property, without confusion or damage: And though to set the mark of another Man alters not the property, yet it may work such a detriment as may be very mischievous; and therefore by the Common Law of *England*, if *A. S.* shall maliciously set the mark of *J. D.* upon his Goods, to the intent *J. D.* shall or may be brought into any trouble, or put to any damage or charge, an action of the case will be against *J. S.*

*The Curlew of  
London do give to  
each Member a  
particular Mark,  
which cannot be  
used or appro-  
priated without  
a particular or-  
der and leave of  
the Company  
and Party, and  
so other Com-  
panies.*  
3 Cro. fol. 471.

## CHAP. VII

## Of Factors.

- I. Factors, their qualifications generally considered, as inference to their employment.
- II. Of Commissions, and the words in the same, that qualifies them in their employment.
- III. Of Commissions to Factors that limit their actions.
- IV. Of a Factor that deals for several Merchants, of the obligations that obligand not oblige each other.
- V. Of their power, considered as inference to the dispensing with the Debtors of their Principals.
- VI. Where the false entry, or unfaithfulness of the Factor, subjects him to answer damage to his Principal; and of the like committed by the Principal, where in answer to the Factor.
- VII. Of Goods remitted to Factors and lost in their possession, who bear the misfortune.
- VIII. Bills of Exchange drawn on the Factor by the Principal, and accepted, but before day of payment the Principal becomes bankrupt, whether the same must be paid.
- IX. Of Freightage of Ships by a Factor, where he is obliged to for the same discharged.
- X. Of the general rules to be followed, concerning the construction of their actions.

**A** Factor is a Servant, created by a Merchants Letter, and taketh a Kind of provision called Factorage; such Persons are bound to answer the loss, which happens by over palling or exceeding their Commission: but a simple Servant or an Apprentice can only incur his Masters displeasure. The Spaniard hath a Proverb: *Quien pasa la Commission, pierdido el Provision*; He that exceeds his Commission shall lose his Factorage: But time and experience hath taught them to know better things, for now it is: *Subvulca la paga, His Purse must pay for it*. The gain of Factorage is certain however the success of the Voyage proves; and it is the prudence of Merchants to honest employ and industrious Persons, for otherwise the Factor may grow rich, and the Merchant poor; the first being sure of his reward, the latter uncertain of his gain.

II. In Commissions they now generally insert these words, *Dispose, do, and deal therein as if it were your own*; by which the actions of the Factor are to be excused, though it turns to his Principals loss, because it shall be presumed he did it for the best, and according to his discretion.

III. But bare Commission to a Factor, to sell and dispose, will not enable him to trust or give further day of payment; for in the due execution of his authority he ought on a Sale to receive *quid pro quo*, and as he delivers one receive the other; for otherwise by

by that means, as they may trust six Moneths; they may trust fifteen years. Nor by the vertue of that clause, of *Doing as if it were their own*, they trust out to an unreasonable time; as ten or twenty years instead of one, two, or three Moneths, which is the Customary time for the like Commodities: And so it was adjudged where one had remitted Jewels to his Factor in *Barbary*, who disposed of this same to *Adulphack* the Emperour for a Sum certain to be paid at a time, which being elapsed; the Factor not obtaining it, was forced to make the same good to his Principal.

IV. Again, one and the same Factor may act for several Merchants, who must run the joynt risque of his actions, though they are meer Strangers to one another; as if five Merchants shall remit to one Factor five distinct Bales of Goods, and the Factor makes one joynt Sale of them to one man, who is to pay one moyety down, and the other at six Moneths end; if the Vender breaks before the second payment, each man must bear an equal share of the loss, and be contented to accept of their dividend of the Money advanced.

But if such a Factor draws a Bill of Exchange upon all those five Merchants, and one of them accepts the same the others shall not be obliged to make good the payment.

V. And as the Authority and Trust reposed in Factors is very great, so ought they to be provident in their actions for the benefit of their Principals; and therefore if Factors shall give time to a man for payment of moneys contracted on Sale of their Principals Goods, and after the time is elapsed they shall sell Goods of their own to such Persons for ready Cash (leaving their Principals unredeemed) and then such Men break, and become insolvent, the Factor in equity and honesty ought to make good the losses, for they ought not to dispense with the nonpayment of their Principals Moneys after they become due, and procure payment of their own to an other mans loss. But by the Laws of *England* they cannot be compelled.

VI. Yet if Goods are remitted to a Factor, and upon arrival he shall make a false Entry at the Customhouse, or land them without the Customer, whereby they shall incur a seizure or forfeiture; whatsoever the Principal is endamaged he must inevitably make good, nor will such general clause help him as above. But if a Factor makes his Entry according to the Invoice, or his Letter of Advice, and it falls out the same are mistaken, if the goods shall be lost, yet the Factor is discharged.

7 Jac. B.R. Rep.  
416. Barton &  
Saddack Balstr.  
1 p. 103.

Mch. 17. Jac. C.  
B. Tan Heath  
versus Turner,  
Winch 34. 25.

Levison versus  
Kirke Trim. 7 Jac.  
in B.R. Lane Rec.  
por. 65.



And as Fidelity, diligence, and honesty are expected from the Factor; so the Law requires the like from the Principal, judging the Act of one to be the Act of the other, and therefore if a Merchant shall remit Counterfeit Jewels to his Factors, who sell, and dispose them for valuable considerations, as if they were right; if the Factor receives any loss or prejudice thereby, by imprisonment or other punishment, the Master shall not only make good the damage to the Factor, but also render satisfaction to the Party damaged: And so it was adjudged; where one *How* was possessed of three Counterfeit Jewels, and having Factors in *Barbary*, and knowing one *Southern* a Merchant was resident on the Place, consigns those Jewels to his Factor, who receiving them intreated *Southern* to sell those Jewels for him, telling him they were good Jewels; whereupon *Southern*, not knowing they were counterfeit, sold them to the King of *Barbary* for eight hundred Pounds; and delivered the Money to the Factor, who remitted the same to *How*; the King of *Barbary* not long after finding himself deceived, committed *Southern* to Prison till he repaid the eight hundred Pounds: Whereupon *Southern* coming for *England* brought his action against *How*, and had Judgment to recover his damage; for the Principal shall answer for his Factor in all cases where he is party to the Act or wrong. And so it is in Contracts, if a Factor shall buy Goods on the Account of the Principal, especially if he is used so to do, the Contract of the Factor will oblige the Principal to a performance of the bargain.

VII. When Factors have obtained a provence or profit for their Principal, they must be careful how they dispose of the same, for without Commission or order they must be responsible. Goods committed to Factors ought in honesty to be carefully preserved, for the trust is great that is reposed; and therefore a Factor robbed in an Account brought against him by his Principal, the same shall discharge him†. And so it is if a Factor buys Goods for his Principal, take Money that is false, he shall there make Good the loss; yet if he receives Money, and afterwards the same is by Edit or proclamation lessened in value, the Merchant and not the Factor must there bear the loss.

Again, in Letters of Credit the Factor must be sure to see whether the Commission is for a time certain, or to such a value, or not exceeding such a Sum, or general, in which he must have a careful eye.

VIII. A Merchant remits Goods to his Factor, and about a Month

Hill. 24 Jac. B.  
K. Cro. 2. part. fo.  
490. Bridgman  
127. Popham 149  
not resolved  
that Book.

Hil. 46. Eliz. B.  
K. Petties & Sa-  
mes case Goldsbr.  
fol 137.

† *Southern's case*  
*Coke lib. 4.*

Moneth after draws a Bill on him; the Factor having effects in his hands, accepts the Bill; then the Principal breaks, against whom a Commission of Bankrupt is awarded, and the Goods in the Factors hands are seized; it has been conceived the Factor must answer the Bill notwithstanding, and come in a Creditor, for so much as he was indebted by reason of his acceptance to pay.

*Quere.* If equity may not relieve in such case.

**XX.** If a Factor enters into a Charter Party with a Master for Freightment, the Contract obliges him; but if he lades aboard generally the Goods, the Principals and the lading are made liable, and not the Factor, for the Freightment.

The Principal orders his Factor, that as soon as he hath loaded (he having Moneys in his hand) to make an Assurance on the Ship and Goods, if the Ship happens to miscarry by the Custom of Merchants, he shall answer the same, if he hath neglected his Commission; so it is, if he having made an Assurance, and loss hath occurred, he ought not to make a Composition without orders from his Principal.

Generally the actions of Factors do depend on Buying, Selling, Freightment, and all other the Heads that have been treated in the Second Book, by which their employment is universal in matters Maritime, and of Commerce; and the questions which would arise touching the same, if treated on, would be in infinitum. However these are to be the Standard rules, which should govern their actions; viz. honesty, faithfulness, diligence, and observing of Commission, or Instructions, which being considered, and weighed by those that shall be Judge of their actions, a right understanding and determining of the matters arising between them and their Principals, would soon be ended.

But those sort of Factors that have wanted those things, seldom or never render any other account, but long, and tedious Chancery Suits, by which they not only have endamaged their very Trade, but see to marry their Principal to a double affliction, by obliging them to sue either a Beggar, or that which is worse, a naughty man.

On the other hand, Factors that behave themselves worthily and prudently in the service of their Principals, ought after their tedious service to be numbered amongst those that justly challenge that worthy denomination of *Merchants*. And such was he who never made breach of Commission, in the service of his Principal, but once; that was, when Wines were committed to him to dispose of, but the price (by reason of a glut) fell: advice being given to the Principal of the lame, who immediately in Passion writes to his Factor to take a hammer and knock out the heads; but the Factor considering

(that

(that leave must be given to looters to speak) knew better things, and kept the Goods, and sold them for their full value, and when Accounts were to be made, instead of bringing to the Account of Wines their heads knock'd *per order*, worthily brought *per count*, sold at their *intrinsic* value. Such faithful Ministers, I say, fully deserve that of our Saviour, *Well done*, &c. and to be no more called Factor but Merchant.

## CHAP. VIII. Of the Laws of Nature and Nations.

- I. Of the variety and contrariety of humane actions, and from whence they spring.
- II. Of the difficulties that happen in the observing our obligation in finding that which is lawful.
- III. How the Laws from whence they flow, and wherefore the Laws of Nature are above ours.
- IV. No man naturally more a Judge than another of Natural Laws.
- V. Nature's Laws are instituted for her word goodness, and riches, but State Laws for quiet and repose.
- VI. Of punishment required by Kings against those that violate the Laws of Nature or Nations, though the same touch not them nor their subjects; and of punishing and equating of criminals and equating.
- VII. Of punishing and equating others that are just, and the wisdom of the same.
- VIII. Of Kingdoms bound to render mutual assistance, but not to be bound by another by the Law of Nations, part.
- IX. That such power of executing the Judgments or Decrees of any foreign Nation, should not be that of Life or Death, or else judgment bel.
- X. Of settling the Imaginary grand in a Kingdom absolute, in another how it is limited by Contract, and of the difference of them, and equity about.
- XI. How that right of dominion, possessions, and the reason of the power, &c.

**P**lain Reason shows us, that Natural and Mathematical causes have more certitude than Civil; for Nature is always uniform and alike in its operations. Hence fire always burns, and never melts a stone, when the ayr naturally tends downwards, and never stays in the middle. In Mathematical causes ordinarily the forms, are such as have no middle interposed, as betwixt even and odd. There is no *medium partis participationis*, betwixt a right line and a crooked; there is no middle sort of line, thus two and two always make four.

But Civil or Humane actions, proceeding from a mutable and various principle (the will\*) cannot always be alike or uniform. And besides the will within, humane actions without are subjected to different circumstances, and to infinite encounters, by reason of which their excessive number, they cannot be foreseen while

Men

\* In quid naturale sit spectandum in hoc quod bene secundum naturam se habent, non in deprecativis. Arist. Polit. I. 5.

Men are making Laws: Hence we may understand, wherefore it is said, *Omnis Defectus in jure est periculosa*; and that *summum Jus* at some time may be found *summa injuria*; as to render a Man his Sword, when he is actually mad, &c. And as circumstance hath power to change the matter, so in the form of the action it leaves in the middle a latitude, sometimes enclining to one extreme, sometimes to another.

For Example; betwixt that which by precept we are commanded ever to do, and that which we are commanded never to do, is plac'd that which is lawful for us now and then to do, or not to do, in matters of our own right, so far as they seem expedient, or not expedient for us: Thus *Joseph* is called a just Man, because he thought of divorcing himself from *Mary*, though upon circumstances he would not, &c. But that which perplexes us all here is, that this *licitum* leans sometimes more to the one hand, sometimes more to the other, sometimes more to that which is absolutely good, sometimes more to that which is absolutely bad; from whence grow scruples and doublings, whether in such wilight we really participate more of light than of darkness, that is, more of good than of evil.

III. Humane Laws grow most out of these middle things, *ex mediis licitis*; and upon right examination we find, that a Man had nothing else to dispose, for we (poor subordinate Vessels) cannot so much as deliberate *de absolutis debitis*, and *absolute illeitis*, for they were in force before Man, Prince, or People were in being, and God himself cannot now alter them, they flowing intrinsically, either from his Sanctity, Wisdom, and Justice, as he is a Creator and Governour; or Else they flow from Nature, whose rule (according to Gods making it by that which is in himself is right reason and honesty): This uprightness of Nature, together with that obligation we have to be subject to it, was not moment after us, and therefore we could not determine any thing about it; for which cause we have not a Legislative power to alter or diminish any of Nature's Laws.

IV. Saint Paul tells us of those who without any after knowledge of Gods revealed will or Laws to Man, were condemnable by those of Nature alone, in the punishing the Breakers thereof. No Man is Naturally more a Magistrate than other; otherwise what meant Cain, when after his murder he cryed *whosoever shall find me will slay me*?

V. And though humane Laws remember us of those things, yet it is not as if they gave their original and primary force

*Non ideo id  
Deum velle quia  
justum esse (that  
is due in Law)  
quia Deus voluit.  
Anaxaschus  
apud. Plutarch.  
in Alexandro.*

*Vasq. II. Contra.  
54-4.*

*Gratius de Jure  
Bellis ac Pacis, l. 1  
cap. 1. §. 14.*

of obliging; yet; reason of State is not busied so much about inward piety and virtue, as it is about publick quiet and repose, or those actions which regard another mans receiving right or wrong. And hence it is that great prodigality is not so severely punished as little robbery, and that *malus homo potest esse bonus Civis*; the reason is, because though he may do himself wrong in his own rights, yet he may always do other men right in theirs; in which there any clear reason, wherefore those lesser sins and impieties should be punished by any but God, who is wisest to know them, justest to weigh the merit of them, and powerfullest to punish them.

This is the State of Gods and of Nature's Laws, to which we are all equally obliged, but our differing and circumstantiated Laws are only to give a rule for an equal and mutual community in things, which God and Nature gave us to dispose of as we would our selves.

VI. Hence it is that Kings, and such as have equal power with Kings, have a right to require punishment, not only for injuries committed against themselves or their Subjects, but for those also that do not peculiarly touch themselves, whatsoever Persons that do unmanly violate the Law of Nature or of Nations: for the Liberty by punishments to provide for humane Society (as hath been already mentioned) was in the hand of every man; but after Commonwealths and Courts of Justice were ordained, it resided in the hand of the highest Powers, not properly as they are over others, but as they are under none. For subjection to others hath taken away that right; yea so much more honest is it to vindicate other mens injuries then our own, by how much more it is to feared, that a man in his own by too deep a resentment may either exceed a measure, or at least infect his mind; however, his right of punishing an equal remains still in those places where the People remain, as in great Families, and not in Cities, or under some Government; and therefore those that have now possessions of any Parts of the New World, or American Isles, till they have either voluntarily submitted to a Government, or put them and their discovery into the hands or protection of some Prince that may exercise power, there remains the old and natural right of punishing for offences, and so likewise where Persons shall be assaulted by Pyrats on the Seas, if they be overcome, they may be immediately executed by the Law of Nature; for otherwise there would be a Failure of power to punish such. Besides, the old natural Liberty remains in Places where are no Judgements; so where they are taken and brought to a Port, and the Judge openly refuses the Trial of them;

or

Grotius de Jure  
Bell. ac pacis, l. 2.  
cap. 21.

Vide chap. Py-  
racy § 11, 12.



or that a Trial of them cannot be had without an apparent detriment *Lex. extra D.*  
and loss to the Captors, Justice may be done upon them by the Law *quod. cit.*  
of Nature.

VII. Two Pyrats resolving to assault and rob the next Yel-  
fel they meet with (not knowing each others condition or design)  
encounter, and the one happens to be overcome by the other;  
the question is now, whether the above mentioned right so far  
remains, as that the stronger may execute him that he hath over-  
come? Right reason dictates, that the evil doer may be punished,  
not who should punish him; but that Nature sufficiently sheweth,  
that it is most convenient to be done by him that is Superior; yet  
doth it not demonstrate this to be necessary, except Superior be ta-  
ken in that sense that the evil doer be thought to have made him-  
self thereby inferior to any other, and to have as it were degra-  
ded him from the order of men into the number of Beasts subject  
to no man, and such are Pyrats, who have no other denomina-  
tion but Night-wolves or Beasts of Prey. By Nature it is or-  
dained, that the better command the worse; And Aristotle  
saith, *The worse are provided for the use of the better, as well*  
*in Naturals as in Artificials*: It follows hence, that at least a  
guilty Person ought not to be punished by another equally  
guilty, to which purpose is that saying of Christ, *Whoever of*  
*you is without sin (that is such sin) let him throw the first*  
*stone*. Pertinent is that saying, *The Sentence can have no Autho-*  
*rity, where he that judgeth is to be condemned*; From whence  
it follows, that the right of punishing in such case at such time  
ceases.

*Non reddit fa-  
ciendo quod de-  
bet pati ideo quod  
debet Philo. ac  
care dum festina-  
tis, ad parias je-  
rendus festinatis.*

\* Fol. 14.

VIII. Kingdoms, which are equal in power, and having no  
dependance on each other, cannot be commanded nor correc-  
ted of another; but if there be a question, to execute the Decree  
or Judgment of one in the Territory of the other, there may  
issue forth a Commission of entreaty, under the Seal of the Prince,  
directed to the Judges in that place where the Defendant is resi-  
dent, and the Judge to whom the said Commission is directed may  
award execution, according to the Laws of Nations: And so it was  
adjudged, where one having recovered a Debt before the Gover-  
nour of *Friesland*, Defendant upon that fled for *England*, the Go-  
vernour at the Request of the Plaintiff, issued forth his Commis-  
sion of Request, directed *Omnes Magistratus infra Regnum An-*  
*glia regant*, to make execution of the said Judgment; upon  
which the Judge of the admiralty in *England* issued forth an Exe-  
cution of that Sentence, and the Defendant was taken, upon which

*5 Jac. in B.R.  
Rolls Abridge-  
ment, Wiers case  
upon a Habeas  
Corpus fol. 390f*

he brought his *Habeas Corpus*, and adjudged the Sentence well Executed by the Laws of Nations, and according to the Common Law of this Realm.

So likewise if a *Dutch-man* takes up Goods at the Port of *London*, and gives a Note under his hand for the payment of the same, and then flies into *Holland*, the Vendor may apply himself to the *Lord Mayor of London*; and upon proof of the delivery, and Sale of the Goods, the *Lord Mayor* making a Certificate of the same, and sending it under the City Seal directed as above, they of *Holland* will, and do Execute the same upon the Party.

Herein this last Case differs from the first; for by the former if there should fall a question about the interpretation of the Judgment or Sentence, the same cannot be done, for they are not to examine the same; and the reason is, lest the Stranger be moved at another time to do the like, and so dissolve the Judgments whereof they should demand the execution, the which would be done more through jealousy of the State, than for any justice in them; besides the Judgments or Sentences, which are matters of Record, and of the greatest security in a Kingdom, the presumption that they were justly given shall always be understood.

IX. But in the latter the same may be examined, that is, the Merchant may be heard as to his legal defence, either to the lessening or discharging the debt or damage, but against the testimony certified, no objection can be made, but the same is admitted as legally proved.

But if there be a question of Honour or Life, there they may not execute the Judgments of Foreign Judges, especially if they have not known the merit of the causes, or seen the Informations, or heard the Witnesses but more especially in *England*, for there can in no respect whatsoever the life of a Man, (let his offence be never so heinous) be brought to punishment without a Legal Trial, and that by the producing of Witnesses upon oath to his face, yet Princes for the respect they bear each other, and for the Good of Justice, though they cannot at the bare request of the Judges of another Prince, put them to death, yet they may for exemplary punishments (which ought to be made upon the place where the fact was committed) yield the natural Subject to his natural Prince, unless the Prince to whom the Fugitive is fled finds that he is unjustly pursued, for in such cases he is not bound to yield him; yet, he is forbidden by the Law of God to restore a bound Man, which

\* *Cok. 4. fol. Inf. fol. 38.*

*Spo de Inf. & Jure. l. 3. q. 1. artic. 7. Satius judicamus esse paucos aliquos malos ferre, quam immensam multitudinem, Zo. naras*

which is fled into another Mans house, to avoid the fury of his Master.

And as the same is in cases Forraign, so likewise in those Estates that are under the *Crown of England*; and therefore if a Man recovers against *17. S.* in the *Kings Bench in England*, and then the Defendant flies over into *Ireland*, the Judgment may be certified over into the *Chancery in Ireland*, and they may by *Adjourns* send it into the *Kings Bench there*, and they may award *Executions* or otherwise the party may bring his Action of Debt on the same; so the like has been done for Decrees given in the *Chancery in England*, which have been exemplified under the Great Seal, directed to the *Kings Lieutenant*, for the putting the same in execution there; but in no case a Judgment given in *England* may be certified over under any other Seal, but that of the Great one.

† Page. 24 Cap. 2.  
in B.R. in Hibernia  
inter Ward and  
Moore.

But in *Scotland* it is otherwise; for that is a Kingdom Absolute, and not like *Ireland*, which is a *Crown* annexed by Conquest, but the other is by Union; and though they be United under one Prince and *idolum*, yet their Laws are distinct, so as if they had never been United; and therefore the execution of the Judgments in each other, must be done upon Request, as above, and that according to the Laws of Nations.

But *Colonies or Plantations*, which are reduced into the condition of Great Families, have not this right of Requesting, for they are governed by the Laws prescribed by the Sovereign of the same, who may set Jurisdictions, and make them places privileged not to have the Persons attached or arrested in any other places, but within their own bounds; so likewise upon their first Forming or Institution, may so declare, that for any Debt or Contract made or done in any place but in that of the same *Plantation*, they shall not be impleaded; and therefore in *Virginia* at this day, if a Man contract a Debt in *England*, and lies to the same, he cannot be there impleaded: But if a Man takes up Goods, and carries the same over thither, there he may be sued in the place; so likewise if it can be proved he carried over the money borrowed, and this amongst others of the Laws and Constitutions of those *Plantations*, is preserved inviolably, the same being as it were a pledge and general safety, which is given to those Inhabitants that shall resort thither, and there plant themselves for the good of the Place; and although those that thither flee, by reason of great and irreparable losses, have contracted debts far beyond their ability to satisfy, a failure of which, in strictness of Law, may

(if the Creditor pleases,) oblige their Rodies to imprisonment; yet doth it not thence follow, that the same ought to be exacted; for though the Care of Men may gratifie the revenge of the Creditor, yet it never can pay the debt; wherefore if those ends by themselves in a moral estimation be not necessary; or if other ends on the opposite part occur, not less profitable or necessary; or if the ends proposed by imprisonment may be attained another way, it will then follow, that if there be nothing of obligation on the Debtors part, to render himself a Prisoner to the Creditor; then then if the same can or may be avoided by flight, the same in conscience may be done; according to that of Cicero, *It was not fit perhaps to dismiss him being brought to Judgment, but that he should be enquired after, and brought to Judgment, was not necessary.*

Ad Quintum  
Tract. 1. 21.



A Short

# A Short Table of the Principal Matters contained in this Book

Distinguished by Lib. for the Book, Chap. for the Chapter, and s. for the Paragraph.

## Accessory.

Lib. Chap. 5.

**P** If in the attempt kills a person, by the Law Maritime the Slayer only is Principal, and the rest only Accessories: but by the common Law otherwise.

1.4.13.

**N**o Accessory to Piracy can be tried by virtue of the Stat. 8 H. 8. but he must be tried in the Admiralty.

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## Acceptance.

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2.4.14

**A**verage *Vide* Contribution.

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*Though*



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